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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 114

VARIOUS ITEMS OF PERSONAL PROPERTY, ETC.; THE WATERLOO DISTILLING CORPORATION ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 14, 1930

CERTIORARI GRANTED OCTOBER 13, 1930

(35,024)

(35,024)

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA, Libellant,

vs.

THE VARIOUS ITEMS OF PERSONAL PROPERTY, DISTILLING equipment and other articles located at the premises of the Waterloo Distilling Corporation, located at 43 Race Street, in the Village of Waterloo, New York, and of which an itemized statement is set out herein and immediately following under the heading of "Schedule A", and the various items of real property belonging to the Waterloo Distilling Corporation, Seneca Solvents & Chemical Corporation, Max Rein, and Fannie Rein, being situate in the Village of Waterloo, New York, and described and set forth herein immediately following under the heading of "Schedule B", Respondent; The Waterloo Distilling Corporation, The Seneca Solvents & Chemical Corporation, Max Rein, Fannie Rein.

NOTICE OF APPEAL

[fol. 2] To May C. Sickmon, Clerk of the United States District Court, Western District of New York, and to Richard H. Templeton, United States Attorney for the Western District of New York.

SIRS: Take notice, that The Waterloo Distilling Corporation, The Seneca Solvents & Chemical Corporation, Max Rein and Fannie Rein, respondents herein, do hereby each appeal to the United States Circuit Court of Appeals for the Second Circuit, from the judgment rendered against each defendant in this Court, on the 31st day of January, 1929.

Dated February 21, 1929.

Lewis Landes, Attorney for Respondents, The Waterloo Distilling Corporation, The Seneca Solvents & Chemical Corporation, Max Rein and Fannie Rein, Office & P. O. address No. 233 Broadway, Borough of Manhattan, City of New York, and Thomas L. Newton, Attorney for Respondents Above Named, No. 601 Walbridge Bldg., Buffalo, New York.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

LIBEL

[fol. 4] To the Honorable John R. Hazel and Simon L. Adler, Judges of the United States District Court, in said district:

The libel of the United States of America, by Richard H. Templeton, United States Attorney for the Western District of New York, its attorney, who in this case prosecutes in its behalf, represent respectfully as follows:

1. This libel of information is filed by the United States of America in its own right, and on this day of September, 1928, comes Richard H. Templeton, United States Attorney for the Western District of New York, and having just been authorized so to do by the Commissioner of Prohibition, pursuant to the provisions of Section 3214 of the Revised Statutes of the United States and the authority vested in him by the Secretary of the Treasury under the Act of March 3, 1927, prays the seizure and condemnation of certain alcohol, articles, materials, personal property and real property, as listed in the appended Schedules A and B, which description of the personal and real property libelled is incorporated herein and made a part hereof as fully as though rewritten, and said attorney informs this Court.

2. That on the 15th day of August, 1928, Andrew McCampbell, Esq., an officer of the Bureau of Prohibition and designated as Prohibition Administrator for the Third Administrative District of the United States, which includes the Northern and Western Districts of New York, pursuant [fol. 5] to the authority vested in him by the Secretary of the Treasury under the Act of March 3, 1927; did seize on land within the said Western District of New York, the real and personal property described herein, together with all the buildings situate, lying and being on the said land, and all the items of personal property used in connection therewith, which said real and personal property have ever since been and now are in his possession, custody and control, pursuant to said seizure.

3. That said attorney is informed and believes that said property, both real and personal, prior and up to the dates

of the illegal diversions of untax paid liquors thereon and therefrom, to wit, October 1, 1926 and March 1, 1927, and divers other days between said dates, belonged to the Waterloo Distilling Corporation, a corporation organized and existing under the laws of the State of New York, being then and there engaged in and operating thereon and therefrom the business of a distiller as defined in Section 3247 of the Revised Statutes of the United States, and that the Seneca Solvents & Chemical Corporation, Max Rein and Fannie Rein then and there claimed and still claim some interest in the said real and personal property, the character and extent of which said interest is to said attorney unknown.

4. Your libellant further presents that the said items of alcohol, articles, materials, personal property and real property were at the dates of said illegal diversions of said [fol. 6] untax paid liquors hereinafter referred to, to wit, on October 1, 1926 and March 1, 1927, and divers other days between said dates, and are now and have ever since been forfeited to the United States and are subject to a declaration of condemnation and forfeiture, within the meaning and intent of Sections 3257, 3281 and 3453 of the Revised Statutes of the United States, for the causes and reason hereinafter set forth.

Count I

For a first cause of forfeiture the United States Attorney gives the Court to understand and be informed:

That the Waterloo Distilling Corporation, a corporation located at 43 Race Street, Waterloo, New York, and within the jurisdiction of this Honorable Court was at and prior to October 1, 1926, and until March 1, 1927, engaged in and carrying on the business of a distiller, as defined in Section 3247 of the Revised Statutes of the United States, and did then and there within the meaning of Section 3281 of the Revised Statutes of the United States engage in and carry on said business with intent to defraud, and did then and there defraud the United States of the tax provided by law on the spirits distilled and withdrawn by it, that is to say, the Waterloo Distilling Corporation then and there was the owner of the alcohol, distilling apparatus, articles and personal property heretofore listed herein in the caption of this cause and designated as Schedule A, and the real prop-

[fol. 7] erty heretofore listed herein in the caption of this cause and designated as Schedule B, which itemized statements are incorporated herein equally as though rewritten, and did then and there in engaging and carrying on its said business as a distiller, as defined in Section 3247 of the Revised Statutes of the United States, produce and store in said distillery, warehouse and denaturing plant, large quantities of alcohol, including the alcohol described in Schedule A hereinbefore referred to, and then and there with intent to defraud the United States of the tax on said spirits did withdraw large quantities thereof from its said distillery, warehouse, and denaturing plant, ostensibly for non-beverage purposes, but in fact for beverage purposes and did not pay the tax at the beverage rate of $6.40 per proof gallon as provided by Section 600-A, Revenue Act of 1918, as amended.

That by reason of the said Waterloo Distilling Corporation then and there engaging in and carrying on the business of a distiller in and upon its distillery, warehouse, and denaturing plant aforesaid, with intent to defraud the United States of the said tax on the alcohol as produced, there became and were forfeited to the United States, in accordance with Section 3281 of the Revised Statutes of the United States, the alcohol, distilling apparatus, articles, personal property, and real property heretofore listed herein in the caption of this cause and designated as Schedules A and B, which itemized statements are incorporated herein equally as though rewritten.

[fol. 8] Count II

And for a further cause of forfeiture the United States Attorney gives the Court to understand and be informed:

That the Waterloo Distilling Corporation, within the jurisdiction of this Honorable Court, was at and prior to October 1, 1926, and until March 1, 1927, and has ever since been engaged in and carrying on the business of a distiller as defined in Section 3247 of the Revised Statutes of the United States, and did then and there, within the meaning of Section 3257, of the Revised Statutes of the United States, engage in and carry on the said business in an attempt to defraud and did then and there defraud the United States of the tax provided by law on the alcohol distilled and withdrawn by it, that is to say, that the Waterloo Dis-

tilling Corporation, then and there was the owner of the distillery, warehouse and denaturing plant, and of the alcohol, distilling apparatus, articles and personal property heretofore listed herein in the caption of this cause and designated as Schedule A, which itemized statement is incorporated herein equally as though rewritten and did then and there in engaging and carrying on its said business as a distiller, as defined in Section 3247 of the Revised Statutes of the United States, produce and store in said distillery, warehouse, and denaturing plant large quantities of alcohol, including the alcohol described in Schedule A, heretofore referred to, and then and there in an attempt to [fol. 9] defraud the United States of the tax on said alcohol did withdraw large quantities thereof from its said distillery, warehouse, and denaturing plant, ostensibly for denaturing and industrial purposes, but in fact for beverage purposes, and did not pay the tax at the beverage rate of $6.40 per proof gallon as provided by Section 600-A of the Revenue Act of 1918, as amended, in cases of withdrawals for beverage purposes.

And that by reason of the Waterloo Distilling Corporation, then and there engaging in and carrying on the business of a distiller in and upon its distillery, warehouse, and denaturing plant aforesaid in an attempt to defraud the United States of the said tax on the alcohol so produced, there became and were forfeited to the United States, in accordance with Section 3257 of the Revised Statutes of the United States, the alcohol, distilling apparatus, articles and personal property heretofore listed herein in the caption of this cause and designated as Schedule A, which itemized statement is incorporated herein equally as though rewritten.

Count III

And for a further cause of forfeiture the United States Attorney gives the Court to understand and be informed:

That the alcohol described in Schedule A, hereinbefore referred to, and which itemized statement is incorporated herein equally as though rewritten, was at and prior to the [fol. 10] date of its seizure by the Prohibition Administrator on August 15, 1928, and has ever since been within the meaning and intent of Section 3453 of the Revised Statutes of the United States, goods, wares, merchandise, articles

and objects on which taxes are imposed by law, in that it was and is alcohol on deposit in the distillery and bonded warehouse of the Waterloo Distilling Corporation, Seneca County, State of New York, within the jurisdiction of this Honorable Court, a more particular description of which alcohol is heretofore listed herein in the caption of this cause and designated as Schedule A, which itemized statement is incorporated herein equally as though rewritten, on the diversion of which said alcohol from said distillery and warehouse and denaturing plant to beverage purposes after withdrawal, a tax at the rate of $6.40 per proof gallon would become due and payable as provided in Section 600-A of the Revenue Act of 1918, as amended, and the said Waterloo Distilling Corporation, then and there did possess and have within its custody said alcohol for the purpose of selling and removing the same in fraud of the internal revenue laws and with the design to avoid the payment of the said taxes, that is to say, that the said alcohol was then and there within the possession and custody and control of the said Waterloo Distilling Corporation, for the purpose of being sold and removed by it, ostensibly for denaturing and industrial purposes, but in fact for beverage purposes, and with the intent and design on the part of the said Waterloo Distilling Corporation not to pay the tax at the beverage [fol. 11] rate of $6.40 per proof gallon as required by said Section 600-A of the Revenue Act of 1918, as amended.

And that by reason of the said Waterloo Distilling Corporation, then and there having within its possession the alcohol described in Schedule A, hereintofore referred to, which itemized statement is incorporated herein equally as though rewritten, for the purpose of selling and removing the same in fraud of the internal revenue laws and with design to avoid payment of the taxes thereon, the said alcohol, distilling apparatus, articles and personal property heretofore listed in the caption of this cause and designated as Schedule A, which itemized statement is incorporated herein equally as though rewritten, then and there became and was forfeited to the United States in accordance with the provisions of Section 3453 of the Revised Statutes of the United States.

Wherefore, in consideration of the premises, your libellant prays:

First. That the above enumerated alcohol, distilling apparatus, articles and other personal property and real property be proceeded against and seized for condemnation, confiscation and forfeiture, and that to this and this Honorable Court may order to issue the process of attachment and monition in due form of this Honorable Court in such cases, and that the said Waterloo Distilling Corporation, Seneca Solvents & Chemical Corporation, Max Rein and Fannie Rein, or any other person having or pretending [fol. 12] to have any rights, title or claim in or to said property, may be cited to appear herein, and answer all and singular the premises aforesaid, and if any of the said parties be "Not Found", that they may be cited by process of publication in the manner of this Court.

Second. That by an appropriate order this Honorable Court may adjudge and decree the said property so described as aforesaid, was unlawfully held, possessed and used and intended for use in violation of Sections 3281, 3287 and 3453 of the Revised Statutes of the United States, and may order all said personal and real property confiscated to the United States to be sold, or otherwise disposed of as provided by law, as described in Schedules A and B.

Third. That this Honorable Court may issue all such orders, decrees and judgments as may be necessary and may grant your libellant a decree for the costs of this proceeding.

Fourth. That your libellant may have such other and further relief as the nature of the case may require.

Richard H. Templeton, United States Attorney.

[fol. 13] *Duly sworn to by Richard H. Templeton. Jurat omitted in printing.*

[fol. 14] In United States District Court

[Title omitted]

Answer of Waterloo Distilling Corporation

[fol. 15] The Waterloo Distilling Corporation for an answer to the petition for libel by its attorney, George B. Doyle, alleges as follows:

First. Has no knowledgee or information sufficient to form a belief as to the allegations contained in paragraph marked "1" of the petition for said libel, and therefore denies the same.

Second. Admits that part of paragraph "2" of the petition for libel, in which it is alleged that on the 15th day of August, 1928, Andrew McCampbell, an Officer of the Bureau of Prohibition made an alleged seizure of the premises described in said petition for libel and the schedules thereto attached, and that the said Andrew McCampbell or his agents are now in possession and control of said premises, both real and personal as described in said paragraph, and except so admitted, denies each and every other allegation contained in said paragraph marked "22".

Third. Admits that part of paragraph "3" of the petition for libel in which it is alleged that the Waterloo Distilling Corporation between October 1st, 1926 and March 1st, 1927 was engaged in and operating thereon and therefrom, the business of a distillery, pursuant to the Laws of the United States, and under a permit issued to it by the Prohibition Department of the United States, and that heretofore and on or about the 19th day of May, 1928, the [fol. 16] Waterloo Distilling Corporation sold all of its right, title and interest, both real and personal property in said distillery, as more fully described in the petition for libel, to the Seneca Solvents & Chemical Corporation, a New York corporation, except that part heretofore conveyed to Max Rein and Fannie Rein, and except as so admitted, denies each and every other allegation contained in said paragraph marked "3" of the petition for libel.

Fourth. Denies each and every allegation contained in paragraph marked "4" of the petition for libel.

Fifth. Admits that part of the second paragraph of the petition for libel marked Count number "1" in which it is alleged that the Waterloo Distilling Corporation was at and prior to October 1st, 1926 and until March 1st, 1927, engaged in carrying on the business of a distiller, and was the owner of the alcohol, distilling apparatus, articles and personal property heretofore listed in the caption of this cause and designated in the schedules attached to the petition for libel, and was so engaged in carrying on the business of a

distiller pursuant to the Laws of the United States, and under a permit issued to it by the Prohibition Authorities of the United States, and also produced and stored in the distillery mentioned in the petition for libel, its warehouse and denaturing plant, alcohol manufactured pursuant to the permit issued to it by the Prohibition Authorities of the United States and according to Law, and except as so ad- [fol. 17] mitted, denies each and every other part of the said second paragraph of Count marked number 1 of petition for libel.

Sixth. Denies each and every allegation contained in the third paragraph of Count number 1 of the petition for libel.

Seventh. Admits that part of the second paragraph of Count number II in which it is alleged that the Waterloo Distilling Corporation was at and prior to October 1st, 1926, and until March 1st, 1927, engaged in carrying on the business of a distillery as provided by Law, and in conformity with a permit issued to it by the Prohibition Authorities of the United States, and according to the Law, and was the owner of the distillery, warehouse, denaturing plant, and of the alcohol, distillery, apparatus, articles and personal property listed in the schedules attached to the petition, and was then and there engaged in carrying on its business as a distillery, and except as so admitted, denies each and every other part of said paragraph of Count number II of the petition for libel.

Eighth. Denies each and every allegation contained in the third paragraph of Count number II of said petition for libel.

Ninth. Denies each and every allegation contained in the [fol. 18] second paragraph of Count number III in said petition for libel, except that the Waterloo Distilling Corporation admits the possession by it of the alcohol in question described in said paragraph, all of which was so possessed pursuant to a permit issued to it by the Prohibition Department of the United States.

Tenth. Denies each and every allegation contained in the third paragraph of Count number III of the petition for libel.

The Waterloo Distilling Corporation further affirmatively alleges:

1. That the facts averred in the libel or petition for libel are insufficient to constitute a cause of action.

2. That the alleged seizure by the United States of America was illegal, contrary to law and unreasonable.

3. That the seizure of alcohol in the premises described in the petition for libel was unlawful, illegal and contrary to law, in that the Waterloo Distilling Corporation had the lawful right and permission from the United States of America, the libellant herein to possess and manufacture the alcohol, more fully described in said petition for libel, and with the schedules thereto attached.

[fols. 19 & 20] 4. That the libel and the petition for libel are in all other respects illegal and unlawful.

Wherefore the Waterloo Distilling Corporation prays that the petition for libel and the libel in this proceeding be dismissed with costs, and that it have such other and further relief as may be just and proper in the premises.

George B. Doyle, Attorney for Claimant and Respondent, No. 601 Walbridge Building, Buffalo, New York.

Duly sworn to by J. Vincent Labate. Jurat omitted in printing.

[fol. 21] In United States District Court

[Title omitted]

Answer of Seneca Solvents & Chemical Corporation

[fol. 22] The Seneca Solvents & Chemical Corporation for an answer to the petition for libel by its attorneys Lewis Landes and Thomas L. Newton, alleges as follows:

First. Has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph marked "1" of the petition for said libel, and therefore denies the same.

Second. Admits that part of paragraph "2" of the petition for libel, in which it is alleged that on the 15th day of August, 1928, Andrew McCampbell, an Officer of the Bureau of Prohibition made an illegal seizure of the premises described in said petition for libel and the schedules thereto attached, and that the said Andrew McCampbell or his agents are now in possession and control of said premises, both real and personal as described in said paragraph and except as so admitted, denies each and every other part of the allegations contained in said paragraph marked "2".

Third. Admits that part of paragraph "3" of the petition for libel, in which it is alleged that the Waterloo Distilling Corporation between October 1st, 1926 and March 1st, 1927, was engaged in and operating thereon and therefrom, the business of a distillery pursuant to the Laws of the United States, and under a permit issued to it by the Prohibition Department of the United States, and that heretofore and on or about the 19th day of May, 1928, the Waterloo Dis- [fol. 23] tilling Corporation sold all of its right, title and interest, both real and personal property in said distillery as more fully described in the petition for libel, to the Seneca Solvents & Chemical Corporation, and except as so admitted, denies each and every other allegation contained in said paragraph marked "3" of the petition for libel.

Fourth. Upon information and belief, denies each and every allegation contained in paragraph "4" of the petition for libel.

Fifth. Admits that part of the second paragraph of the petition for libel, marked Count number "1" in which it is alleged that the Waterloo Distilling Corporation was at and prior to October 1st, 1926, and until March 1st, 1927, engaged in carrying on the business of a distiller, and was the owner of the alcohol, distilling apparatus, articles and personal property heretofore listed in the caption of this cause and designated in the schedules attached to the petition for libel, and was so engaged in carrying on the business of a distiller pursuant to the Laws of the United States, and under a permit issued to it by the Prohibition Authorities of the United States, and also produced and stored in the distillery mentioned in the petition for libel, its warehouse and denaturing plant, alcohol manufactured pursuant to the

permit issued to it by the Prohibition Authorities of the United States and according to Law, and accept as so ad-
[fol. 24] mitted, denies each and every other part of the said second paragraph of Count marked number "I" of the petition for libel.

Sixth. Upon information and belief, denies each and every other allegation contained in the third paragraph of Count number "I" of the petition for libel.

Seventh. Admits that part of the second paragraph of Count number "II" in which it is alleged that the Waterloo Distilling Corporation was at and prior to October 1st, 1926 and until March 1st, 1927, engaged in carrying on the business of a distillery as provided by law, and in conformity with a permit issued to it by the Prohibition Authorities of the United States, and according to the Law, and was the owner of the distillery, warehouse, denaturing plant and all the alcohol, distilling apparatus, articles and personal property listed in the schedules attached to the petition, and was then and there engaged in carrying on its business as a distillery, and except as so admitted, denies each and every other part of said paragraph of Count Number "II" of the petition for libel.

Eighth. Upon information and belief, denies each and every allegation contained in the third paragraph of Count number "II" of said petition for libel.

Ninth. Upon information and belief, denies each and every allegation contained in the second paragraph of [fol. 25] Count number "III" in said petition for libel, except it admits that the Waterloo Distilling Corporation had the possession by it of the alcohol in question described in said paragraph, all of which was so possessed pursuant to a permit issued to it by the Prohibition Department of the United States.

Tenth. Upon information and belief, denies each and every allegation contained in the third paragraph of Count number "III" of the petition for libel.

The Seneca Solvents & Chemical Corporation further affirmatively alleges:

1. That heretofore and on or about the 19th day of May, 1928, the Waterloo Distilling Corporation conveyed to it by deed, all of its right, title and interest in and to all of the property, both real and personal, except of what is known as Watkins Island, the denaturing plant however on said Island being conveyed to the Seneca Solvents & Chemical Coporation, as more fully described in the schedules attached to the petition for libel, and that said deed was duly recorded in the Office of the Clerk of Seneca County on or about the 22nd day of May, 1928, and said deed is respectfully referred to with the full force and effect as if the same had been spread at length hereon and made a part hereof.

2. That the Seneca Solvents & Chemical Corporation is [fol. 26] the owner of all of the property described in the said petition for libel, and claims the same herewith, except as otherwise herein alleged.

The Seneca Solvents & Chemical Corporation further affirmatively alleges:

1. That the facts averred in the libellor petition for libel, are insufficient to constitute a cause of action.

2. That the alleged seizure by the United States of America was illegal, contrary to law and unreasonable.

3. That the seizure of the alcohol on the premises described in the petition for libel was unlawful, illegal and contrary to law, in that the Waterloo Distilling Corporation had upon information and belief, the lawful right and permission from the United States of America, the libellant herein, to possess and manufacture the alcohol more fully described in the said petition for libel with the schedules thereto attached.

4. That the libel and petition for libel are in all other respects illegal and unlawful.

Wherefore the Seneca Solvents & Chemical Corporation prays that the petition for libel and the libel in this proceeding be dismissed with costs, and that it have such other

[fols. 27 & 28] and further relief as may be just and proper in the premises.

Lewis Landes, Attorney for Claimant and Respondent, Office & P. O. address No. 233 Broadway, Borough of Manhattan, City of New York, and Thomas L. Newton, Attorney for Claimant and Respondent, No. 601 Walbridge Building, Buffalo, New York.

Duly sworn to by Thomas J. Dwyer. Jurat omitted in printing.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF MAX REIN AND FANNIE REIN

[fol. 30] Max Rein and Fannie Rein for an answer to the petition for libel, by their attorneys, James F. O'Neill and George B. Doyle, allege as follows:

First. They have no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs marked "1", "2", "3" and "4" of the petition for libel, and the allegations contained in Counts marked "I", "II" and "III" of the petition for libel, and therefore deny the same, except that the said Max Rein and Fannie Rein claim the ownership of that part of the real estate described in the schedules, known as the whole of Watkins Island, with the exception of the denaturing plant, situated on said Island, and as more fully appears from the deed to said property on file in the Office of the Clerk of Seneca County, and duly recorded, and respectfully refer to said deed with the full force and effect as if the same had been spread at length hereon and made a part hereof.

Wherefore Max Rein and Fannie Rein pray that the petition for libel and the libel in this proceeding be dismissed with costs, and that they have such other and further relief as may be just and proper in the premises.

George B. Doyle, Attorney for Claimants and Respondents, No. 601 Walbridge Building, Buffalo, New York, and James F. O'Neill, Attorney for Claimants and Respondents, No. 233 Broadway, Borough of Manhattan, City of New York.

[fol. 31] ***Duly sworn to by Max Rein and Fannie Rein. Jurat omitted in printing.***

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXTRACT FROM CLERK'S MINUTES

[fol. 33] Dec. 13, 1928.

Appearances:

U. S. Atty., Richard H. Templeton, for Government.
Thomas L. Newton, Esq., Counsel for Respondents.
Lewis Landes, Esq., Counsel for Respondents.

Case moved for trial by U. S. Attorney.

Mr. Newton moves to amend answer—leave granted with consent of U. S. Attorney.

Whereupon the following jurors are duly empanelled and sworn and the case doth proceed to trial:

1. Eugene A. Addington.
2. Albert H. Hammersmith.
3. Chester A. Bockstedt.
4. Charles A. Charel.
5. Willard J. Dawson.
6. Ewdard C. Keller.
7. George Korn.
8. Arthur E. Ebert.
9. Michael J. Fink.
10. August C. Embser.
11. Herman C. Flierl.
12. George W. McMurray.

Stipulated that testimony from original transcript of record may be read in evidence.

Mr. Landes moves to dismiss libel; Asst. U. S. Atty. Orr in opposition also Mr. Proper of Prohibition Dept. [fol. 34] Mr. Newton in favor; Mr. Templeton in opposition.

Dec. 14, 1928.

Motion to dismiss denied; exception.

Stipulated all objections and exceptions taken deemed taken for all respondents.

Mr. Templeton opens case for Government.

Mr. Newton asks Court to charge jury only evidence shown on trial to be considered—not opening—so charged.

Stipulated Adm'r's Notice of Seizure of August 18, 1928, was served on respondents, with reservations to attack its legality.

Witnesses sworn for Government: John T. Birmingham, Herbert J. Rambert, Michael C. Kebiney (read from record by Mr. Templeton), Grove L. Higgins (also read), Frank M. Carder (also read), Daniel F. Sheehan, George A. March.

Dec. 17, 1928.

Appearances More Specifically Stated

For the Government: Richard Templeton, Esq., U. S. Atty.; Justin Morgan, Esq., Asst. U. S. Atty.

[fol. 35] For Respondents: George B. Doyle, Esq., Solicitor for Waterloo Distilling Corporation; George B. Doyle and James F. O'Neil, Esqs., Solicitors for Max Rein and Fannie Rein; Lewis Landes, Esq., and Thomas L. Newton, Esq., Solicitors for Seneca Solvents & Chemical Corporation and of counsel for all respondents.

Trial resumed.

Witnesses Sworn for Government: John S. Drake, Edward W. Smith, Willis L. Miller, Harrison De Groff, Jacob R. Ehrlich, Dwight E. Avis, Anna M. Wall, Merle R. Felter (read from record by Mr. Templeton), George B. Vanover (also read), George H. Sanborn (also read), Perley B. Hartwell (also read), Samuel M. Baldwin, Percy W. Darby, Jeremiah J. Green, James A. Connelly (read in), Fred J. Tanner (read), Donald V. Murphy, Frank N. Hintler, Joseph F. Kennedy, Henry H. Clark, Leslie N. Pennoyer, William S. Griffin.

Dec. 18, 1928.

Trial resumed.

[fol. 36] Same Appearances.

Witnesses Sworn of Government: Thomas Pickard, Joseph A. Plouffe, William T. Rooney, Edward N. Peck, Jr., (read from record by Mr. Templeton), Andrew A. Speach (read in), J. Dwight Atwater, Chester A. Baker, Fred J. Fagon, Harry Kemper, Victor Wild, Bernard Moore, Joseph Simone, Charles Boyd, Thomas Patterson, Henry Searles, John C. Cullen, William English, Frank Southheimer, Carl Busch, Timothy Berney (Peck thru Berney, read from record), Walter J. Horner, Le Roy A.

Butell (read in), Edward F. Rosen (read), Fred D. Smith (read), Thaddeus Johnston (read), Alfred Johnson, John W. Fonner (read), William O'Malley, Mortimer Henderson, John O. Timlin, William Shakespeare, John F. Williams, Martha E. Meyer, J. Vincent Labate.

Dec. 19, 1928.

Same Appearances.

Trial resumed.

Witnesses Sworn for Government: J. Vincent Labate (resumed), Martha E. Meyer (recalled).

Government rests.

Mr. Newton moves to dismiss libel as to (1) Respondent's [fol. 37] (2) real property not bonded, except parts for ingress or egress (3) grain alcohol (4) re-tax on alcohol (5) failure to prove cause of action (6) as to denatured alcohol—not distilled spirits.

All denied—Exception.

Mr. Newton opens case for respondents.

Witnesses Sworn for Respondents: Albert J. Jackson, Bennie Lamberte, Charlese F. Moses, James O'Malley, Alexander Goldman (read by Mr. Landes), Violet Rosenblum (read in), Albert D. Osborne (read by Mr. Newton), Ludwig Bauer (read in), LeRoy A. Weller (read by Mr. Landes), John A. McQuade (also read), Martha E. Meyer.

Respondents rest.

Dec. 20th, 1928.

Same Appearances.

Trial resumed.

Witnesses for Government on Rebuttal: Martha E. Meyer, LeRoy A. Weller (recalled and read by Mr. Templeton), John A. McQuade (recalled—read), Robert Takel, Jr. (read in), James W. Yost (read in).

Government rests.

Respondents rest.

[fol. 38] Mr. Newton renews all motions to dismiss made at close of Government's case; denied; exceptions.

Count Three dismissed on stipulation.

Mr. Newton sums up for respondents.

Jury ordered taken to luncheon at expense of Government.

Mr. Templeton sums up for Government.

After listening to a charge by His Honor, the Judge, the Jury here retire at 5:10 p. m. in the custody of sworn officers to deliberate upon the verdict.

The jury here come into Court at 6:25 p. m. and say they find in favor of the Government on both Counts.

Jury polled by order of Court; all concur in report as given by foreman.

All motions reserved until to-morrow morning.

Dec. 21st, 1928.

Same Appearances.

Mr. Newton asks for dismissal of libel on verdict as to real property outside bonded premises except that portion used for ingress and egress, that portion where trucks were stored and that portion used by trucks for ingress and egress; denied; exceptions.

Mr. Newton moves to set aside verdict as contrary to law and against weight of evidence. Denied—Exception. [fol. 39] Mr. Newton moves for stay of proceedings, that term of Court be continued 30 days for respondents to make and file assignment of errors and file Bill of Exceptions; granted.

In United States District Court, Western District of New York

The United States of America, Libellant,

vs.

The Various Items of Personal Property, Distilling Equipment and other articles located at the premises of the Waterloo Distilling Corporation, located at 43 Race [fol. 40] Street, in the Village of Waterloo, New York, and of which an itemized statement is set out herein and immediately following under the heading of "Schedule A", and the various items of real property belonging to the Waterloo Distilling Corporation, Seneca Solvents & Chemical Corporation, Max Rein and Fannie Rein, being situate in the Village of Waterloo, New York, and described and set forth herein immediately following under the heading of "Schedule B", Respondent; The Waterloo Distilling Corporation, The Seneca Solvents & Chemical Corporation, Max Rein, Fannie Rein.

Judgment—Jan. 31, 1929

This cause having come on regularly for trial before Honorable Simon L. Adler and a jury on December 13th, 1928, the libellant appearing by Richard H. Templeton, Esq., United States Attorney, Justin C. Morgan, Esq., Assistant United States Attorney, of Counsel, and all the respondents appearing by Thomas L. Newton, Solicitor, Lewis Landes, Esq., of Counsel, and the evidence having been duly presented and the jury having duly deliberated thereon and having returned a verdict on December 20, 1928, in which they found in favor of the Government on Counts I and II of the libel of information herein; the [fol. 41] Court having duly considered all the issues of law raised by motions of the respondents, and upon all the papers and proceedings heretofore had upon this action,

Now, on motion of Richard H. Templeton, Esq., United States Attorney, it is

Ordered, adjudged and decreed that the alcohol, distilling apparatus, articles and personal property listed in "Schedule A" of the libel herein, and the real property

listed in "Schedule B" of said libel, having been unlawfully held, possessed, used and intended for use in violation of Sections 3257 and 3281 of the Revised Statutes of the United States, be and the same hereby is forfeited to the United States to be sold or otherwise disposed of as provided by law, and that the Waterloo Distilling Corporation, Seneca Solvents & Chemical Corporation, Max Rein and Fannie Rein, or any other person or corporation claiming or pretending to have any rights, title or claim in or to said property, be and they hereby are forever barred and foreclosed from any right, title or interest in or to said property, and that libellant have judgment against the respondents and each of them for the costs incurred on its behalf.

Judgment rendered this 31st day of January, 1929.

May C. Sickmon, Clerk.

[fol. 42] In United States District Court, Western District of New York

The United States of America, Libellant,

vs.

Waterloo Distilling Corporation, Seneca Solvents & Chemical Corporation, Max Rein and Fannie Rein, et al., Respondents

Bill of Exceptions

The libel herein was filed about September 17th, 1927, and the answers on October 17th, 1928, and during the progress of the cause, the following proceedings were had:

Tried before Hon. Simon L. Adler, United States District Court Judge, and a Jury, beginning Thursday, December 13th, 1928, 10 A. M.

Appearances of Counsel

Richard H. Templeton, Esq., United States Attorney, and Justin Morgan, Esq., Assistant United States Attorney, for Libellant.

[fol. 43] George B. Doyle, Esq., Solicitor for Waterloo Distilling Corporation.

George B. Doyle, Esq., and James F. O'Neill, Esq., Solicitors for Max Rein and Fannie Rein.

Lewis Landes, Esq., and Thomas L. Newton, Esq., Solicitors for Seneca Solvents & Chemical Corporation and of Counsel for all Respondents.

Mr. Newton: I would suggest one thing, that the appearances be noted. To state it briefly, you can say that Mr. Lewis Landes and Thomas L. Newton appear for all the Respondents. I am doing that so we won't be bothered with objections; one objection will be made for all defendants, and each defendant then will get the benefit of the objection and exception all the way through. We appear for all the defendants, so you will have a record binding on all of the defendants; we appear of counsel for all the defendants, except those who personally appeared in the answers, and you can just note those appearances, if you want to. They are as follows: Mr. George B. Doyle, Solicitor for the Waterloo Distilling Corporation. Mr. Doyle and Mr. O'Neill, Solicitors for Max Rein and Fannie Rein. Lewis [fol. 44] Landes and Thomas L. Newton, Solicitors for Seneca Solvents & Chemical Corporation, and of Counsel for all the respondents who have appeared.

If your Honor please, the Respondents ask leave to amend their answers to insert a count, No. 5, immediately before the demand for judgment, which amendment shall read as follows:

"That the Government filed, on October 4th, 1927, in this Court, an indictment charging the Waterloo Distilling Corporation, and certain of its agents, with a conspiracy to violate the National Prohibition Acts and thereby elected to proceed under the National Prohibition Act, and are thereby estopped from bringing this libel proceeding."

Mr. Templeton: The Government has no objection to that statement as a statement of fact, because it is a fact that an indictment was found and that later conviction was had under it; but of course holds that the indictment was under Section 27 of the Criminal Code under which the

indictment was found and the indictment tried; it therefore in no way avoids a responsibility under the statutes on which this libel is founded.

The Court: Amendment allowed.

(Jury drawn, examined by the Court, and accepted.)

Mr. Templeton: May it please the Court, I think it might [fol. 45] be at this time well to advise the Court that Counsel have agreed, and it will be well to have it on the record, that with reference to the evidence in this case, Counsel on either side may, instead of calling a witness in person, from some distant point, read the record from the transcript of the record in the case on appeal, both Counsel reserving the right to enter objections as the testimony proceeds, so as to have a ruling of the Court on any particular question, and both Counsel reserving the right to read the question and answer from the original transcript, or from the original stenographic minutes.

Mr. Newton: Yes, that is so, with the understanding that if either side wants a witness who is available, that they may have the right to have him available, if we want one or you want one that we feel there is something that is not in the record. I do not know of any such witness now. And on the further understanding that no witness that we read the testimony from is dead; that he must be alive.

Mr. Templeton: That is agreeable.

Mr. Newton: So stipulated.

Motion to Dismiss

Mr. Landes: The respondents respectively move that the libel be dismissed upon the ground that the Government having elected to proceed in the criminal proceeding under [fol. 46] the provisions of the National Prohibition Act, are now barred from proceeding under the Internal Revenue Laws, Mr. Templeton having preliminary to taking of the jury, stated that this was a proceeding involving a conspiracy, and not under the provisions of the National Prohibition Act.

The Court: You do not mean that this is the proceeding? You mean that the prior proceeding?

Mr. Landes: The prior proceeding, the Government having elected to proceed to try the defendants in the criminal

proceeding for violation of the provisions of the National Prohibition Act, although the general charge was that of a conspiracy, the overt act had to do with the question involving the violation of the National Prohibition Act.

The Court: Motion denied.

Mr. Newton: Exception to all the Respondents. May it be stipulated, Mr. Templeton, that all objections and exceptions in the case, when taken, be deemed taken for all Respondents?

Mr. Templeton: So stipulated.

The Court: So understood.

(Mr. Templeton, on behalf of the Government, opens case to the jury.)

Mr. Templeton: Might I ask Counsel if they will stipu- [fol. 47] late that notice of seizure was served on the respondents?

Mr. Newton: Which do you mean, Mr. Templeton? The Marshal's? Which seizure do you want? We concede that a notice of seizure was served, but not that it was legal—reserving any rights as to its legality. We will admit receiving this, without conceding its legality.

Mr. Templeton: I offer this in evidence, as Government's Exhibit No. 1.

(Letter of August 29th, 1928, marked Government's Exhibit No. 1.)

That is a letter of August 29th, 1928: "In conformity with Section 5314 of the Revised Statutes, you are hereby authorized and requested to enter suit in the form of a libel for the forfeiture to the United States of the real and personal property located in the towns of Waterloo and Fayette, Seneca County, New York, and the described in schedules A and B, copies of which are enclosed."

That is the authority for commencement of the suit. The question as just asked me—we are referring now to the Administrator's notice of seizure on August 29th.

Mr. Newton: The one you have in your hand?

Mr. Templeton: I am now referring to the stipulation.

Mr. Newton: The seizure by Andrew McCampbell, No. 1, the Prohibition Administrator of this district.

[fol. 48] JOHN T. BIRMINGHAM, witness for Libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am in the employ of the Government as an Assistant Administrator for the Northern and Western Judicial Districts of the State of New York, in charge of permissive work in the Buffalo Office, and am familiar with the permits for the use of specially denatured alcohol and completely denatured alcohol. I know about the Government regulations which were in effect in October, November and December, 1926, and January, February and March, 1927 and that they have been amended from time to time.

(Permit No. 86 marked Government's Exhibit No. 2 in evidence.)

Mr. Templeton: I am reading from Permit No. 86. It is a permit for an industrial alcohol plant, No. 130.

(Reads to the Jury Government's Exhibit No. 2.)

Attached to it is a statement signed by Rodenberg, Vice-President of the Waterloo Distilling Corporation, which is the application of the Waterloo Distilling Corporation for the permit.

(Permit No. 99 marked Government's Exhibit No. 3 in evidence.)

Mr. Templeton: (Reads Government's Exhibit No. 3 to the Jury.)

[fol. 49] Attached to that is the application of December 11th, 1925, signed by Waterloo Distilling Corporation, J. Vincent Labate, Secretary and Treasurer, sworn to December 11th, 1925.

(Permit No. 93 marked Government's Exhibit No. 4 in evidence.)

Mr. Templeton: This is Permit No. 93 to operate a bonded warehouse, dated March, 1926, which is authority to operate a bonded warehouse at Waterloo. Permit expires November 1, 1926. Maximum quantities received 325,000

proof gallons. Signed by Roberts, Federal Prohibition Administrator, to which is attached the application for this permit signed by Rodenberg, Vice-President, and sworn to by him on March 5th, 1926. Permit expired December 31st, 1926.

(Letter from Roberts, Prohibition Administrator, to the Waterloo Distilling Corporation, dated February 1st, 1926, marked Government's Exhibit No. 5, in evidence.)

(Reply to that dated February 9th, 1926, signed by Rodenberg for Waterloo Plant and marked Government's Exhibit No. 6 in evidence.)

(Letter dated February 25th, 1926, marked Government's Exhibit No. 7 in evidence.)

Mr. Templeton reads Government's Exhibits Nos. 5 and 7 to the Jury.

[fol. 50] Mr. Birmingham: Those exhibits read, were received by the Administrator at the Buffalo Office in due course of the Government's business in connection with the Waterloo Plant and the permit issued to it. In that connection, the regulations required the submission to the Department of the Government of records with reference to the corporate stockholders and the directors, and the giving of the name of someone who was to sign all official papers from the Waterloo Distilling Corporation operating under a permit.

(Certified copy of resolutions marked Government's Exhibits Nos. 8 and 9, and read to the Jury by Mr. Templeton.)

(Letter dated November 27th, 1926, addressed to the Hon. R. C. Harper, Prohibition Administrator, marked Government's Exhibit No. 10, and read to the Jury by Mr. Templeton.)

(Letter dated December 7th, 1926, signed by Ludwig Baur, President, and addressed to Hon. R. C. Harper, Federal Prohibition Administrator, marked Government's Exhibit No. 11 and read to the Jury by Mr. Templeton.)

(Letter marked Government's Exhibit No. 12 in evidence and read to the Jury by Mr. Templeton.)

(Letter date April 11th, 1927, marked Government's Exhibit No. 13 for identification.)

[fol. 51] Mr. Birmingham: All the exhibits received in evidence came into the Administrator's office in the due course of the work under permits which had been granted to the Waterloo Distilling Corporation by the Government. Government's Exhibits Nos. 14, 15 and 16 are the reports furnished by the Waterloo Corporation to the Government for the months of October, November and December, 1926, respectively.

Mr. Templeton reads from Exhibit No. 14 showing the shipments of alcohol by the Waterloo Distilling Corporation for the month of October, 1926, and that on October 11th, 1926 C. D. 5 alcohol was produced and 50 drums thereof disposed of to Seneca Solvents and Chemical Company, Syracuse, N. Y., and on the 12th, 100 drums of C. D. 5 to the Seneca Solvents and Chemical Company, 1108 West Genesee Street, Syracuse, N. Y., and on the 13th, 100 drums of No. 5; on the 14th, 80 drums of No. 5, 11 drums of No. 2, 6 drums of No. 6; on the 15th, 101 drums of No. 5; on the 16th, 50 drums of No. 5; on the 21st, 50 drums of No. 5, all being sold and shipped to the Seneca Solvents and Chemical Corporation, 1108 West Genesee Street, Syracuse, N. Y.

Mr. Birmingham: With reference to that the alcohol referred to would be completely denatured alcohol which had been manufactured as pure grain alcohol at the Water-[fol. 52] loo Plant, placed in the bonded warehouse at Waterloo and later placed in the denatured plant and denatured by the Waterloo and the report read was made by the Waterloo Distilling Corporation as permittee to the Administrator in Buffalo, indicating what disposition had been made as to denaturing and as to selling or disposing of the product.

(Mr. Templeton reads to the Jury Form 1468-D in Government's Exhibit No. 15 and also reads Government's Exhibit No. 16.)

During the time covered by this libel up to March, 1927, Charles H. Fingerhood came to the office with reference to the permit and talked with me at various times about it and the operation generally. One time he came with reference to a renewal of the permit. The reports, Government's Exhibits 14, 15 and 16, are governmental reports required under the regulations furnished to me.

Cross-examination.

By Mr. Newton:

Before these permits were granted the Government made investigation and inspection of the applicants and the plant to which they were to be granted. Completely denatured alcohol was used from October 1st, 1926 until March 1st, [fol. 53] 1927 in the making of paint, varnish, lacquer, and for radiators and other commercial purposes, and very large quantities were reported as being used for those purposes. There was no restriction from October 1st, 1926 to March 1st, 1927, as to whom the manufacturer of completely denatured alcohol might sell, so long as he sold it to be used for legitimate purposes. I think from October 1st, 1926 to March 1st, 1927, there was a Government restriction as to whom the manufacturer of completely denatured alcohol might sell. I was sworn in a case involving the Waterloo, and at that time I swore there was no restriction as to whom the manufacturer of completely denatured alcohol might sell but you will find in there that I qualified that by referring to the limitations of Section 4 of Title 2 of the National Prohibition Act. I know at that time completely denatured alcohol was a poison, but I did not know that it could be cleaned for beverage purposes. I don't know that at this period completely denatured alcohol could be cleaned for beverage purposes. I stated that the sale of completely denatured alcohol is provided for by Section 4 of Title 2 of the Prohibition Act. If I don't know whether it could be cleaned for beverage purposes, I know that the section quoted of the Prohibition Law has to do with it because that section relates to denatured alcohol.

Q. It doesn't relate to it if it cannot be cleaned for beverage purposes.

A. Well, it relates to it. Whether it relates to that particular kind or not is something I don't know.

At that time no one who purchased completely denatured [fol. 54] alcohol needed a permit to purchase it. I assume that the reason the Government did not at that time require a permit to purchase completely denatured alcohol was because of the denaturants that were added to it. I suppose that it must have been difficult to clean it or they would not have allowed it to be sold like that. I don't know that it couldn't.

HERBERT J. RAMBERT, witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am an attorney-at-law admitted to practice in the State of New York, at present in the employ of the Government and assigned to the Administrator in Buffalo. At your request I went to the County Clerk's Office, Seneca County, for the purpose of examining the records with reference to the real estate owned by the Waterloo Distilling Corporation.

(Certified copy of deed from the Industrial Grain Products Corporation to the Waterloo Distilling Corporation, dated December 20th, 1923, marked Government's Exhibit No. 17 in evidence.)

Exhibit 17 covers the property known as the Watkins Island which is located in the Seneca River.

(Certified deed from the Industrial Grain Products Cor-[fol. 55] poration to Waterloo Distilling Corporation dated December 20th, 1923, marked Government's Exhibit No. 18 in evidence.

Exhibit 18 covers the property that is located on the south side of Seneca River known as the Industrial Alcohol Plant, the Old Industrial Distilling Company plant. The other one covers the Columbia Distilling Company plant.

(Deed from Waterloo Distilling Corporation to Max Rein and Fannie Rein, dated October 10th, 1927, marked Government's Exhibit No. 19 in evidence.)

(Deed from Waterloo Distilling Corporation to the Seneca Solvents and Chemical Corporation dated May 19th, 1928, marked Government's Exhibit No. 20 in evidence.)

(Deed from Waterloo Distilling Corporation to Seneca Solvents and Chemical Corporation marked Government's Exhibit No. 21 in evidence.)

Exhibit 20 covers the property that was formerly known as the Industrial Alcohol or Industrial Distilling Plant on the south side of the Seneca River.

Exhibit 19, deed to Max Rein and Fannie Rein, covers a portion or nearly all of Watkins Island except a certain portion which is reserved and is the bonded premises covering the bonded warehouse and denaturing plant.

[fol. 56] Exhibit 21 covers that portion of Watkins Island which was reserved in Exhibit 20. It covers the bonded denaturing warehouse and also a certain portion in there, known as "Starting at a pond." Nobody knows where to find it as the pond is now out of existence. I found maps in the County Clerk's Office and made tracings of those maps.

(Two map tracings marked Government's Exhibit 22 in evidence.)

(Blue prints and tracings and white prints of the Waterloo premises and properties as furnished by Waterloo Distilling Corporation to the Government in connection with the issuing of the permits to the Waterloo Distilling Corporation by the Government marked Government's Exhibit 23 in evidence.)

I made an inventory of the personal property and contents of the buildings and made notes thereof and had it typewritten. The inventory attached to Government Exhibit 1 is the one made by me. It is the complete inventory.

Cross-examination.

By Mr. Newton:

In the list I have an item of 154.07 ounces of brucine, in a package in the White Elephant, so-called, I think it was found there but I am not positive. I think there were two packages of brucine found in the Denaturant Storage Warehouse. I found under Solvent Warehouse No. 2, 54 ounces [fol. 57] and wrote the word "Brucine" on it. Under Solvents Warehouse No. 2, I wrote down 54 ounces Brucine because I found the word "Brucine" on it. I am not a chemist and did not analyze it. I simply took the name of the box as indicating the contents. That was similar in appearance to the Brucine set out under the heading "Denaturant Storage Warehouse."

Taking Exhibit 22 and stating in general terms what part of the premises are bonded premises and what are not, I say, "Here is the bonded Warehouse, what we chall bonded Warehouse No. 1, this building here." That was bonded and then this is where the alcohol came from the stills here. There is a strip there and that is bonded, and here is the distillery itself with the steel column and condensers and this is bonded. The maps themselves show that it is

bonded. Then there was a strip came down across over to the Island, and this building here called the Denaturing Plant Bonded Warehouse No. 30. The buildings that are bonded on the premises are Bonded Warehouse No. 1 which is a big building on the map, and the Distillery proper, which is a little black oblong on the map, but these buildings are all under one roof. All places where alcohol goes had to be bonded so this pipe line, that ground underneath it was bonded. Then another large alcohol pipe line that ran from what they call the large receiving tanks to where it was bareled, that was bonded, and then there was the bonded Denaturing Warehouse.

[fol. 58] Redirect examination.

By Mr. Templeton:

Briefly, I would say that the bonded premises contained the distillery building, the bonded warehouse building and the denaturing plant.

Mr. Newton: Respondents object to the receiving of the item of brucine marked brucine under heading "Warehouse No. 2" at this time, insofar as it may be used in connection with any issue of fraud.

The Court: The Court will answer upon that question when it comes up.

Mr. Newton: I want to reserve that as not consenting to its going in for that purpose until it becomes material.

Michael C. Kebeny, a witness for the libellant, testified as follows:

I was in charge of the Administrator's Office and files from New York City. I examined the files with reference to Form 147 for the withdrawal of specially denatured alcohol from December, 1926 on. I found that paper.

Mr. Templeton: I now offer the application for permit to procure specially denatured alcohol, Permit 201.

Mr. Newton: I object to it on the ground that it is hear-[fol. 59] say as to any respondent here, and incompetent.

The Court: Objection overruled.

Mr. Newton: Exception.

(The application for permit marked Government's Exhibit 24 in evidence, is read by Mr. Templeton to the Jury.)

Exhibit 24 authorized the purchase of specially denatured alcohol. It was authorized on September 23rd.

Mr. Newton: I object to that part as to what happened to the permit on March 17th, 1927, upon the ground that it is immaterial and irrelevant.

The Court: I will receive it.

Mr. Newton: Exception.

It was authorized on September 23rd, cancelled March 17th, 1927. There was nothing reported as having been purchased under the permit.

Cross-examination.

By Mr. Newton:

It is not extraordinary and it occasionally happens that no specially denatured alcohol is shipped under permits granted. There is nothing wrong that I know of that the Waterloo Distilling Corporation did not ship anything. The Greendale Company is a bonded company.

[fol. 60] Grove L. Higgins, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

(Letter of September 27th, 1926 to Jones & Higgins, signed by Standard Solvents & Chemical Company, by R. Beck, offered in evidence.)

Mr. Newton: Respondents object to the same on the ground that it is incompetent, irrelevant and hearsay as to respondents.

Mr. Templeton: It already appears of record that all of the C. D. 5 shipped out during the three months involved was shipped to the Standard Solvents and Chemical Corporation, of Syracuse. This is offered to show the rela-

tions between the Waterloo Distilling Corporation, by its president, and show the relations between the Waterloo Distilling Corporation and the Standard Solvents which company was alleged to have received all of the——

The Court: Who is that signed by?

Mr. Templeton: R. Beck, president of Waterloo Distilling Corporation. He signed it——

Mr. Newton: Exception.

(Letter of September 27th, 1926 to Jones & Higgins, signed by Standard Solvents & Chemical Corporation, by R. Beck, marked Exhibit No. 25 in evidence, and read to [fol. 61] the Jury by Mr. Templeton.)

The witness, Mr. Higgins, continues:

I am the G. L. Higgins referred to in the letter. Mr. Jones and I own the premises No. 1108 West Genesee Street, Syracuse, New York. We rented the premises to the Standard Solvents & Chemical Corporation. The letter came to us in connection with the leasing of that property by it. This letter constitutes the lease. We accepted the terms of the letter as set forth in that letter. They entered the premises October 1st, 1926, and remained there until April 1st, 1927, at the monthly rental of $225, which they paid. The place was known as Motor Mart.

Mr. Newton: I move to strike out the evidence of Witness Higgins on the ground that it is incompetent, immaterial and hearsay as to the respondents.

The Court: Motion denied.

Mr. Newton: Exception. In connection with my motion to strike out that testimony of Higgins, and also the letter, the evidence does not show that at the time of the date of this letter, Mr. Baur was president of the Waterloo Corporation.

The Court: Motion denied.

Mr. Newton: Exception.

[fol. 62] Cross-examination.

By Mr. Newton:

The building is occupied by several different tenants. There is an oil station in front of it, two garage sales rooms

and some shops and a big garage in the rear, a separate building connected with it.

FRANK M. CARDER, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

In 1926 I was employed at Syracuse, New York, by a real estate firm and was in charge of the rentals of commercial properties. In September, 1926, a man by the name of Back or Beck came to see me. The man was identified as Baur. I discussed the rental of certain premises with him and then took him to the office of Mr. Higgins, one of the owners of 1108 West Genesee Street, and Mr. Baur said he could only rent the place until April. The only lease was the memorandum lease (Government's Exhibit 25). Mr. Baur and I went to the bank where he changed a hundred dollar bill and we went back to Mr. Higgins' office to pay the first month's rent.

[fol. 63] Cross-examination.

By Mr. Newton:

He said he was not renting it for himself but for the Standard Solvents & Chemical Company.

Mr. Templeton: Reading from the testimony of Percy W. Darby at the bottom of the page of the former record, of the record in the other case, Folio 507 on Page 169: "In my opinion the one who signed——

Mr. Newton: I object to that upon the ground that the genuineness of disputed handwriting cannot, as a general rule, be determined by comparing it with other handwriting of the party; a handwriting specially prepared for the purpose of comparison, so if the writing here was not admissible for the purpose of comparison, then it is not permissible for an expert to give testimony on that which is not admissible for comparison.

Mr. Templeton: The paper which I propose to offer in evidence will not be used as a basis for comparison.

Mr. Newton: No, but the basis on which he gives his testimony is using it for comparison.

The Court: What do you want to put in? Let me see it. (The Court examines paper.) Well, what is the offer now?

Mr. Templeton: I now offer in evidence a telephone con-
[fol. 64] tract between the New York Telephone Company and the Standard Solvents & Chemical Corporation, signed "Standard Solvents & Chemical Company, R. Beck, President."

Mr. Newton: I object to it as incompetent and immaterial, not binding on the respondents, and hearsay.

The Court: Received at this time, subject to motion to strike out.

(Photostatic copy of telephone contract between New York Telephone Company and Standard Solvents & Chemical Company marked Government's Exhibit 26 and read by Mr. Templeton.)

Daniel F. Sheehan, witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am a freight agent at Waterloo, and in September, 1926 was Station Agent at Cayuga for the New York Central Railroad.

Mr. Templeton: I offer in evidence New York Central Railroad Shipper's Request to load empty car, dated October 12th, 1926.

Mr. Newton: I object to it on the ground that it is incompetent; and, first, no matter who signed it, it is immaterial, and second, it is incompetent until it is connected up with some of the respondents.

[fol. 65] Mr. Templeton: We will connect it up, your Honor.

Mr. Newton: In connection with that, I ask to ask a preliminary question of the witness.

Preliminary examination.

By Mr. Newton:

At the trial last April my attention was called to Joe Beck, Mr. Baur, Mr. Fingerhood, Mr. Lagier, and Mr. R. Beck, all present in this Court Room. I could not just recall who. If I recall correctly their names were called off at the time. I saw a man sign the paper, "John Muller". At the time I looked at the man I said that Muller was not Joe Beck, Mr. Baur or Mr. Fingerhood. I said that Muller was a large corpulent man, very much so.

Mr. Newton: Now, I object to it upon the ground that the witness does not identify the Muller, the name signed to the proposed offer in evidence; he is not identified as anyone connected with the respondents in any way, shape or manner.

By Mr. Templeton:

Q. What time of day or night was it when this was signed by Mr. Muller?

A. It was in the forenoon, I should say about 9 o'clock but I have no data to refresh my memory on it now.

[fol. 66] Q. Was the shipping under this ever consummated?

Mr. Newton: I object to that as incompetent and immaterial.

By Mr. Templeton:

Q. Someone calling himself Muller came to you and signed this paper?

Mr. Newton: I object to that as incompetent and immaterial.

Mr. Templeton: I ask to have the paper marked for identification.

(New York Central Railroad Shipper's Request to load empty car, Cayuga, New York, dated October 12th, 1926 marked Government's Exhibit 27 for identification.)

Q. What conversation did you have with this person named Muller?

Mr. Newton: I object to it as incompetent and hearsay.
Mr. Templeton: I withdraw the question.

Mr. Templeton continues direct examination:

Following the receipt of Exhibit 27 for identification, we placed the car for shipment on the team track at Cayuga.

Mr. Newton: I am not objecting to this now upon the [fol. 67] theory that the District Attorney is going to connect it up. I reserve the right to strike it out.

The car was placed October 12th, if I recall correctly. I have no record now when it was placed. It was a box car. It was placed about one-eighth of a mile from the Station, with buildings immediately around it, an old blacksmith shop in one direction and the Beacon Milling Company's plant opposite. Nearby the track, and also some coal sheds on the same side as the Beacon Milling Company's building. The team track ran alongside the Beacon Milling Company's plant, and the old coal shed. A car placed on this switch at this point would be loaded from trucks or wagons by the shipper from the regular driveway. Someone came to load that car after it was placed. I am not sure of the day they started to load it. They started to load it in the morning shortly after 8 o'clock. A hotel building and three other buildings intervened between this switch where the car was placed, and my office. They completed loading the car just after noon. I did not see the car from the time they started to load it until it was finished loading. It was my duty to have the car filled by a man under my supervision. After the car was loaded there were several drums in it. I did not open any of them. In shipping orders of this kind the agent applies the freight rate. No bill of lading was ever given for the car. It contained but 50 drums when I observed the contents of the car. Deputy Sheriff Smith was there and two or three other Deputies. I do not [fol. 68] know their names. The order for the placing of the car was received about the day it was started to load or placed. I received a verbal order first and after that it was several days—not ten days, before the car was actually placed. I cannot say what time of day the written order was signed. It may have been several days.

Mr. Templeton: Just strike out that part. Will you please answer my question, Sir?

It was not six o'clock in the morning or six o'clock at night that the written order was signed. I cannot say whether it was 12 o'clock in the morning or noon time. It was around 11 o'clock of some day. The order was signed several days before the car was actually placed, if I recall, about ten days before. When the car was requested the order was signed, and if I recall correctly, it was the very first day this person called to see me and that was about ten days before the car was placed. After I saw the Deputy Sheriff at the car, the car was sent out empty and the Sheriff Miller took charge of the contents of the car. The car was seized October 13th, if I am correct. Looking at Government's Exhibit 27 for identification does not refresh my recollection of the date when the written order was signed. I know Mr. Charles H. Fingerhood. After the seizure of this car I saw him in Court here, and before that I saw him at Waterloo when I was stationed there.

[fol. 69] Q. What did he say to you at that time?

Mr. Newton: I object to it as incompetent and immaterial. It is long after the time charged in the libel.

The Court I will receive it.

Mr. Newton: Exception.

A. He passed the time of day with me. This was several weeks after the taking by the sheriff of this carload of drums.

Q. What did Mr. Fingerhood say to you?

Mr. Newton: Same objection.

The Court: Overruled Mr. Newton's objection.

A. He said: "I am Mr. Fingerhood that was at Geneva, the proceedings there", and he asked me if I knew him, if I recall correctly, and I told him I remembered seeing him at Geneva. He had another man with him and he said, "Do you know this man? It is Mr. Muller," and I said to him that I didn't know as I did *as I did* know the man—that he didn't appear like the Mr. Muller I knew. Referring to Mr. Muller I meant the man who ordered the car and signed Government's Exhibit 27 for identification. He said there were several brothers—that he wasn't surprised at my not knowing him, or something to that effect.

Q. How many times did you see Muller who signed that shipping order, from the time he signed it until the car was loaded?

[fol. 70] Mr. Newton: I object to it on the ground it is incompetent and immaterial.

The Court: Overruled.

Mr. Newton: Exception.

A. When he first ordered the car the morning that he started to load the car, and about noon of the day that the car was loaded.

All of the handwriting on Government's Exhibit No. 27 except the name John Muller, is my handwriting.

Mr. Newton: I move to strike out all the evidence of this witness which in any way pertains to Muller, or anything that Muller did, on the ground that it is incompetent and immaterial.

The Court: Motion denied.

Mr. Newton: Exception.

George A. Marsh, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am the Chief of Police at Cayuga, New York, and also engaged in trucking and have lived there about thirty years. I was trucking on October 13th, 1926, in the daytime at a quarter to twelve. I was near the Station at Cayuga unloading for the Beacon Mills. I heard the witness Sheehan testify as to the freight car. I was unloading my load. Five car lengths probably north of me there was a car placed there on the Hay Branch, and I noticed a strange [fol. 71] truck drew up alongside the car, and I heard a lot of rumbling noise, the kind that drew my attention. It sounded to me like steel drums of some sort and pretty heavy, so I took the number of the truck, which was 873-119. When it was unloaded I went up to my sister's. It was a Bulldog truck enclosed with a canvas awning. It was five

tons capacity. It was alongside the freight car headed toward me. It was running its contents into the freight car. I didn't see anybody there. I was unloading my car about 11:30. After that I went to lunch and then called Sheriff Miller at Auburn by phone and talked with his clerk, Mr. Drake. I next saw this car about ten minutes to one, and it had been opened and there were a lot of drums in there. Fifty drums all painted with fresh black paint of some sort. On top, the head. Sheriff Miller and another Deputy of Mr. Miller's were there, and Mr. Sheehan came later. Sheriff Miller ordered my brother-in-law's truck and mine to take the drums to Auburn. The chemist of the Beacon Mills was present there and several people. He took some liquid from the drum. When I went back there at one o'clock the truck was at Mr. Warwick's gas station. I only looked just as I drove by and saw it was empty. From the point where this car was loaded to the Waterloo Distilling Corporation, is 11 miles. I do trucking between those points with large trucks.

Q. About how long does it take you to make the run from Waterloo to Cayuga?

Mr. Newton: I object to that on the ground that the [fol. 72] proper foundation for asking the question has not been laid.

A. It would take a big hour.

Mr. Newton: Just a moment. I object to it as immaterial. It depends on what kind of truck he is driving, and other circumstances, what the conditions were.

JOHN F. DRAKE, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am and was in October, 1926, a deputy sheriff of Cayuga County. I recall the Chief of Police of Cayuga, George Marsh, calling up my office and after receiving the message from him, I made a memorandum. It was October 13th,

1926. I notified Sheriff Miller of my telephone conversation. Marsh called about fifteen minutes to twelve.

EDWARD W. SMITH, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am a deputy sheriff of Cayuga County. I heard Mr. [fol. 73] Drake, the last witness, testify. I recall the time and date of that conversation as October 13th, 1926. The sheriff talked with me about the same matter. I got my car and took the deputies to Cayuga. In Cayuga, near the corner of a store there was a Mack truck No. 873-119 license number, covered with canvas. I walked around the truck, looked at the rear end and saw nothing but a can of black paint and then walked to my car and went down where the freight car was and went to the Station to see Mr. Sheehan, and came back to the freight car, opened the door and found those steel drums with fresh black paint or tar, whatever it was, on both ends. There were about 50 drums. Somebody opened a drum and we took a little of the contents outside and burned it. I think some of the rest took a sample. The number of the freight car was 27059. It is eight to eleven miles from Waterloo to Cayuga, New York. I went back to Auburn, got the sheriff and he ordered trucks to take it to Auburn. I went back to Cayuga with Sheriff Miller. I recall seeing some prohibition officers there. Mr. Ehrlich—there were two there anyway.

WILLIS L. MILLER, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

In October, 1926, I was sheriff of Cayuga County. I recall the conversation referred to by the last witness, Mr.

[fol. 74] Smith. It was on October 13th, 1926, about noon. I sent the deputies there and then he came back after me between twelve and one. My office, as sheriff, was in Auburn. Mr. Drake notified me. It is about nine miles from Auburn to Cayuga. On Smith's return he had another talk with him and then I went to Cayuga. The first thing I saw was the truck on the corner with license No. 873-119. We then drove to the side where the freight car was and I found 50 drums. I ordered some trucks to have it taken over to the Jail where it was stored. They took one away as a sample at the other trial. When we arrived at Cayuga, Mr. DeGroff and another deputy by the name of Seward Whitcomb, and prohibition officers Ehrlich, Weddigan and Wickham and Silvernail were there.

Harrison DeGroff, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

In October, 1926, I was a deputy sheriff. I recall the time testified to by the preceding witnesses with reference to Cayuga, and leaving Auburn with Deputy Sheriff Smith and driving to Cayuga where I found a Mack truck standing on the corner of the street bearing license No. 873-119 in which I found buckets of black tar dip. Then I went down to where the car was standing on the siding, and Agent Sheehan came down and we opened the car. It contained [fol. 75] 50 drums, the heads of which had been resurfaced with this black fresh paint. I secured a syphon and drew a sample of the contents of two or three of the drums. I found it to be alcohol. I stayed right near the car until the load was removed from the car and was there when it was taken in trucks to the Jail.

Jacob R. Ehrlich, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am and was in October, 1926, a prohibition officer, attached to the Administrator of the District of Upstate New

York, and was then working at the Syracuse Office under Mr. VandeVeer, Agent in charge. I recall being in Cayuga first on October 12th, 1926 around 7 or 7:30 in the evening. I then saw a Pennsylvania freight car on the siding. I had six other men with me; one group watched the freight car from the southerly side and the other from the northerly side. The car was empty. Nothing pertaining to the freight car happened at that time. I next saw the car on the 13th at 1:30 P. M. when there were 50 drums of alcohol in the car which was opened. The heads of the drums had been covered over with a black material which could not be removed. It was freshly put on. When I got there the second time two deputy sheriffs, De Groff and another were there, I think his name is Whitcomb; and Agents Wickham, Weddigan and Silvernail were with me. We opened several [fol. 76] of the drums and took samples. We seized them and transported them to the County Jail at Auburn. Sheriff Miller came up shortly after we arrived. I took the samples into the Syracuse Office myself. I sealed and labeled them and turned them over to Albert VandeVeer and marked them for the purposes of identification. Several days later I assisted in packing them, which they shipped to John F. Williams, United States Chemist, Buffalo, by express. The three bottles shown me contained part of the contents of these loaded drums taken from Pennsylvaania car 27059, at Cayuga on the 13th of October.

(Three bottles containing samples taken from car 27059 marked Government's Exhibits 28, 29 and 30 for identification.)

Dwight E. Avis, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am employed by the Government as Special Agent, Bureau of Prohibition. In 1927 up until about June I was Alcohol and Brewery Inspector. I made an inspection and investigation of the Waterloo Distillery Plant the latter part of May, 1927. I was assigned at that time under the direction of George E. Golding. Mr. Golding and I made

several trips up in the vicinity of Waterloo and we were around the Distillery several times the latter part of May and the first of June, 1927. The first week in June, 1927, [fol. 77] we entered the Distillery and made an inspection, interviewing at that time, Mr. Ludwig Baur, who represented himself as the business manager of the concern, and Dr. Von Baur Breidenfelt, who was his father, who was general manager of the concern at that time. They showed us through the Distillery as well as the denaturing plant and bonded warehouse. We examined certain records there at that time. We also inspected the garage some 50 feet distance from the denaturing plant, in which was then stored three Bulldog Mack trucks. The Distillery is located in the Village of Waterloo, New York, on Race Street. It is an island. We entered the place through a lane leading off Race Street. On the left as you enter the premises you find the bonded warehouse. Directly across the lane or roadway you find the Distillery proper, and next to it the engine room, and directly behind the engine room is a structure used for drying grain. Around a winding lane that crosses a little creek that runs through the premises you find the denaturing plant which is some two blocks distant. Directly across from the denaturing plant, about 50 feet, is the garage, and next to that was a building used by the Standard Solvents & Chemical Company, or some such name. Across the canal on the other side was a building known as the White Eelephant Warehouse which we did not inspect at that time.

(Six license plates marked Government's Exhibits 31 to 36, inclusive, for identification.)

Q. I show you Exhibits for identification, 31, 32, 33, 34, [fol. 78] 35 and 36 and ask you if you ever saw those before?

A. I did.

Q. Where?

Mr. Newton: I object to it on the ground it is incompetent; that the taking of the plates marked for identification, and anything the Government may testify with reference thereto, is the result of an illegal search and in violation of the Constitutional provision that all persons shall be secure in their persons, papers and effects from unreasonable

search and seizure; and I ask leave to ask *me* preliminary question.

Q. Mr. Avis, at the time you were on these premises, while you secured these plates, marked for identification, were you there by virtue of any search warrant?
A. No, sir.

Mr. Newton: Now, I make my objection and motion upon the grounds stated.
The Court: Objection overruled.
Mr. Newton: Exception.

A. Those plates were found in the debris in the garage across from the denaturing plant of the Waterloo Distilling Corporation, Waterloo, New York, on the property of the Waterloo Distillery.

Mr. Templeton: I now offer them in evidence.
Mr. Newton: Same objection, and not binding upon these respondents.

[fol. 79] The Court: Overruled.
Mr. Newton: Exception.

(New York State Commercial license plate for year 1926 marked Government's Exhibits 31 to 36 for Identification, marked Libellant's Exhibits 31 to 36, inclusive, in Evidence).

Q. Now, will you give the license numbers?

Mr. Newton: It is understood that I have the same objection and exception to this testimony without making it again.
The Court: It is so understood.

Exhibit 31, Plate No. 876-922.
Exhibit 32, License No. 876-922.
Exhibit 33, License No. 847-643.
Exhibit 34, License No. 847-643.
Exhibit 35, License No. 961-812.
Exhibit 36, License No. 961-813.

At the time we were there I had a conversation with Mr. Baur with reference to these trucks partially, within the period of the libel. Mr. Baur then stated the trucks did

not belong to the Waterloo Distillery but to a trucking corporation who had done some hauling for the Waterloo in the latter part of 1926, and had not been used to amount to anything since then, and the Waterloo rented the garage to the trucking corporation. On June 20th, we examined the motor number of the trucks. The motor numbers on the trucks, three of which were in the garage and one of [fol. 80] which was in front of the denaturing plant were: Engine No. 74099, Engine No. 77192, Engine No. 70339 and Engine No. 84399. The license plates for the State of New York for the year 1927 on the trucks, were 782-774, 881-990, 881-991 and 881-992.

Cross-examination.

By Mr. Newton:

We found one commercial plate which was a duplicate plate, 961-813. At the time we saw Mr. Baur, he gave us the Government records and all that we were entitled to receive under Government regulations.

Anna M. Wall, witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am a file clerk in the State Bureau of Motor Vehicles, Department of Taxation and Finance at Albany. The applications for licenses for trucks and motor vehicles were filed in my office. I search the files, but not for the one from New York.

Mr. Templeton: I offer as Exhibit 37 Motor No. 74099, License 873-119; and Exhibit 38 Motor No. 74099, License 961-813; Exhibit 39 Motor No. 74099, License 881-992 in Evidence.

[fol. 81] Mr. Newton: Objected to as incompetent and immaterial.

The Court: Overruled.

Mr. Newton: Exception.

(Application for Motor No. 74099, License 873-119, Motor 74099, License 961-813, Motor No. 74099, License 881-992, together with the applications thereto attached, marked Government's Exhibits in Evidence, Nos. 37, 38 and 39, respectively, and read to the Jury by Mr. Templeton.)

Cross-examination.

By Mr. Newton:

Under the Motor Vehicle Law of the State of New York, in the year 1926, if a license holder for auto or truck, lost a license plate, they had to make application for new plates. Under the same law it was necessary for trucks used in the State to obtain their licenses to use the same in the State for the year 1927, before the beginning of the year.

Mr. Templeton: I offer in evidence the permit of the Government to the Bijou Forwarders, Inc., to authorize it to receive, transport and deliver intoxicating liquor for non-beverage purposes, in accordance with Regulation 60, covering Mack Truck No. 74099. The application dated January 4th, 1927, having attached to it a letter from the Bijou Forwarders to Roscoe C. Harper, Federal Prohibi-[fol. 82] tion Administrator, asking for four certified copies of the permit.

Mr. Newton: Respondents object to letter attached to the application on the ground it is immaterial, and the signature on the slip attached to the application and the permit entitled "Signature of persons authorized to sign for permittees", on the ground that it is not material to issues here. The permit, itself, and the application for permit, I have no objection to.

The Court: Overruled.

Mr. Newton: Exception.

(Permit of Government to Bijou Forwarders with application and letter to Roscoe C. Harper, marked Government's Exhibit 40 in Evidence, and read to the Jury by Mr. Templeton.)

Mr. Templeton: I offer in evidence the letter of July 15th, 1925, signed by Ludvig Baur, of W. H. Long & Com-

pany, to the Collector of Internal Revenue, and affidavits attached, verified July 15th, 1925.

Mr. Newton: Objected to on the ground that it is incompetent and too remote from any issue in this case, and immaterial.

The Court: I will receive it.

Mr. Newton: Exception.

(Letter of July 15th, 1925, from W. H. Long & Company to Collector of Internal Revenue, with affidavit attached, [fol. 83] marked Government's Exhibit 41, and read to the Jury by Mr. Templeton.)

Merle R. Felter, a witness for libellant, testified as follows:

Direct examination.

Read by Mr. Templeton:

In October, 1926, I was freight agent, and had been for about three years there, for the Lehigh Valley Railroad at Seneca Falls.

A Mr. Miller came to me with reference to this shipment of machinery referred to in Government's Exhibit—which I will offer presently—and the defendant Fingerhood is the man. He wanted to bill out some alcohol, and did not want to bill out only just a very few cars, and wanted to know what I thought about it, and if I would do it. I told him I did not want to decide then, but to come back a little later.

He came back in about ten days and asked me what I had decided. The first conversation was the latter part of September, 1926, and the last, ten days later, about the date of October 11th, 1926. He came into the station at Seneca Falls. I told him that I decided to take a chance on a few cars. He wanted to know if I had a car ready, and I told him, yes. I asked him when he expected to start in; he said right away. There was a load coming then from Waterloo. In the conversation with him that refers to preparation of the shipping order, Government's Exhibit

73, I wanted to bill it out as drums, and he said no, they [fol. 84] would not allow him to do that. He didn't like to do it that way. I asked him how machinery would go. He said that would be all right. He thought that would do it, so I billed it out as machinery, and he prepaid the freight—eighty-seven and something, I believe—and he handed me fifty dollars besides, and put down another ten dollars, and said "There is ten dollars for the lady", and the lady was my wife, then in the station. The fifty dollars and the ten dollars which he gave me was not a part of the freight bill, or the railroad's money. That was to come to me for billing out the car. Exhibit 73 shows a shipment from Seneca Falls, October 11th, to Cooney Fette. I didn't know who Cooney Fette was. That is the name he gave me. The Exhibit says "Clinton Street Station, Baltimore, Maryland."

(Six shipping orders from Seneca Falls, marked respectively Libellant's Exhibits 42, 43, 44, 45, 46 and 47.)

Exhibit 42 is Chester, Pennsylvania, Seneca Falls, New York, East Penn Junction.

Exhibit 43 is Chicago, Illinois, carbon copy of shipping order attached.

Exhibit 44 from A. J. Webster, Seneca Falls, New York, to M. H. Morgan Company.

Attached to this is carbon copy of bill of lading.

Exhibit 45 is October 12, from C. J. Wilson to George Hornbeck & Company.

Exhibit 46 is consigned to George McDuffy Hardware [fol. 85] Company from C. E. Rogers.

Exhibit 47 is under date of October 11th, Seneca Falls, New York from Cooney Fette, consigned to Co-ney Fette Company.

The defendant Fingerhood gave that direction. It says "Cooney Fette, per John Dunn." I am not sure, really positive whether I signed that myself or not. The "M. R. Felter" is my signature. The original shipping order goes to the shipper and I delivered it to Mr. Fingerhood, and the copy is filed with the Agent's record at Seneca Falls, and a copy of the revenue way-bill is attached and goes with the car. It is dated 1-11-26, seal S-688381 Lehigh Valley 75684,

Clinton St., Baltimore, Md., 416 Seneca Falls, N. Y., Wilkes Barre P. R. R. Cooney Fette & Co., Clinton St. Station, Baltimore, Md., 41,900 lbs. weight. The words "Machinery Noibm" means "not otherwise indexed by me". The freight of $85.50 is on and was paid to me by Fingerhood. The car was shipped from Seneca Falls on the 11th and consisted of drums of alcohol like Government's Exhibit referred to. Machinery was no part of the shipment.

There was another car shipped on the 12th.

This exhibit is dated October 12th, 1926, Seneca Falls, from O. E. Rogers. Mr. Fingerhood spoke to me about this shipment and gave me the name O. E. Rogers. It is billed as "machinery noibm". I do not remember whether Fingerhood suggested machinery or not at that time. I asked him if machinery would be all right, if I remember, [fol. 86] and he thought it would, and we billed it out that way. We decided on those names. It was consigned to George McDuffy Hardware Co., Philadelphia, R. D. G., Willow & Noble Sts., car No. 146. Mr. Fingerhood gave me that information. He said it did not make much difference who the cars went to, just as long as he had the names and knew who they went to. The freight on that car was $85.50 and was "collect". He paid $50 with reference to this shipment. That car, numbered 74176 contained drums of alcohol like Exhibit 70. He told me it was alcohol.

There was another car shipped on October 12th and Exhibit 75 refers to the second car. I believe Mr. Fingerhood gave the name of George Hornbeck Co., Philadelphia, Pa., as the consignee. East Pa. Jct., D. R., Willow & Noble Sts., car 76155, carload lot of Machinery NOIBM, weight 30,000 lbs. The freight was not prepaid. Fingerhood paid me $50 on this shipment. This shipment was not of machinery but of alcohol. I saw the trucks back up to load these cars. Fingerhood told me alcohol was in the trucks. It was a Mack truck. I put these three $50 in the bank in my own account.

On October 13th, Fingerhood saw me again and asked me to ship another car and he gave me M. H. Morgan & Co., Philadelphia, Pa. as the consignee. The shipping order was to state machinery as material shipped. Alcohol was actually shipped. Mr. Fingerhood told me at one time the alcohol was coming from the Waterloo Distillery. This car-

load was loaded from a Mack Truck with radiator slanting [fol. 87] down in front and they had a canvas cover over the whole top. The truck would contain 50 drums. Mr. Fingerhood did not pay the freight on the shipment of October 13th. It was collect. He gave me $50. That went into my bank account.

On October 15th, another car was ordered placed by Mr. Fingerhood.

On the 15th, Mr. Fingerhood saw me with reference to a shipment of two cars. With reference to the shipment of the car covered by Exhibit 77, he wanted to ship another load to Chicago and he gave me Levinsky & Son, Chicago, Ill., as the consignee and paid the freight, and paid me $50 besides. He did not specify and particular commodity to ship this as but thought probably ought to have a change. "Rags in bales", and that is what was stated on the bill-of-lading. He shipped alcohol on this car and it was brought to the station in trucks.

With reference to the shipment covered by Exhibit 78, Mr. Fingerhood gave me the name of Silverman Bros., Chester, Pa. as the consignee and that was alcohol billed as "Scrap castings". The exhibit is signed "A. J. Webster, Chas. Dunn". I do not know who signed that. It looks like my writing there. "M. R. Felter" is signed by me, but I am not positive about the other. I prepared the shipping order under the instructions of Mr. Fingerhood and that was true of each of the other exhibits and they were all signed by me. The names that appear—O. E. Rogers, A. J. Webster, C. J. Wilson and Cooney Fette were placed on these exhibits after Fingerhood and I had talked it over. The last two cars contained alcohol and placed thereon in [fol. 88] trucks. The cars covered by these exhibits were all shipped out at Seneca Falls. The cars covered by these exhibits were billed out at Seneca Falls but they did not go, as they were seized on the night of the 15th or early the 16th. I received $50 on each car covered by Exhibits 42 and 43 from Mr. Miller or Mr. Fingerhood. These cars were loaded in Seneca Falls in the afternoon of the 15th. One of the cars covered by one of the exhibits, I believe, was loaded in the forenoon and the rest I am quite sure were loaded after one o'clock.

I recall seeing the defendant Baur at one time. It was at Seneca Falls near the station. He was standing outside the

car they had just loaded with drums, apparently listening to someone inside talking. I appeared on the platform and asked if they were done and he looked up and said "No, not yet". I do not recall which shipment this was, but it seems it was the second or third shipment. It was one of these shipments I testified about. I saw him once after that, at the Waterloo Distillery. I was going down from upstairs and met him on the stairs and he said "Did they fix you up" and I said "Yes".

After the Government seized the cars covered by Exhibits 42 and 43 they were shipped to Buffalo in charge of Jake Ehrlich. I billed them out.

The car number under Exhibit 44 was Lehigh Valley 77996 and under Exhibit 45 was Lehigh Valley car 75265, and these were the same cars in which the drums were loaded which had been arranged for by Mr. Fingerhood on [fol. 89] the 15th. Jake Ehrlich shipped the cars to Buffalo after they had been seized by the Government.

(Shipping order covering 55 drums of alcohol consigned to the United States Government, c/o Keystone Warehouse, Buffalo, N. Y. and marked Government's Exhibit in Evidence, and also shipping order for the other car which was consigned the same as the other, marked Government's Exhibit in Evidence and covering 50 drums of alcohol.)

That is to say, the shipping order covering these two cars, Government's Exhibits 42 and 43.

Cross-examination.

Read by Mr. Newton:

In the affidavit I swore that a short time prior to October 16th, while on duty at the freight house in Seneca Falls, I was approached by a man who gave his name as "Miller", said man being thick-set, short and fat. Up to this time, I had never seen Fingerhood to know him as Fingerhood. He is not a large man he is very short. He is a good and plump, good sized.

The Mack truck I saw come up there was an ordinary Mack truck, khaki-colored with a canvas top on it, with a peculiar radiator on the front.

I am pretty sure that the name "Mack" was on the truck I saw on October 11th, but I can't remember just exactly.

[fol. 90] The time I saw Miller at Seneca Falls and saw a Mack truck, I didn't see the man Miller help loading any of the cars. I didn't notice him in particular. He didn't wear glasses. The first time I saw Miller, Benny Lambert, a resident of Seneca Falls, was with me. I am positive they were together.

I think I did testify at Geneva, as follows: "I cannot positively identify him, Fingerhood, as the man."

George E. Vanover, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am Captain of Police of the Lehigh Valley Railroad at Auburn, N. Y. I went to Seneca Falls, N. Y., in the month of October, 1926, with the Lehigh Freight House yards and opened up two cars for inspection because of the billing. One car was billed as "Rags in bales" and the other car was billed as "Scrap castings". I made the inspection of these two cars on the morning of October 16th, 126. In the one car I found fifty steel drums, and in the other fifty-five steel drums similar to Government Exhibits 42 and 43. I closed the cars and applied seals to the doors and notified Mr. Sanborn of the Prohibition Department at Syracuse. One car was L. V. 77996 and the other L. V. 75263. "L. V." means "Lehigh Valley". I turned the cars over to In-[fol. 91] spector Sanborn. I was present when samples were taken. Inspector Sanborn was there, and two of his men. I examined the ends of the drums and they were freshly painted.

Cross-examination.

By Mr. Newton:

I saw drums likes these before. At one time many passed through the neighborhood. We handled them on our division.

GEORGE H. SANBORN, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I was a Prohibition Agent in October and November, 1926. I went to Seneca Falls some time in October. I saw Governments Exhibits 42 and 43 on October 17, 1926, at Seneca Falls, when I took samples from four drums on the two freight cars that were on the track beside the Lehigh Valley freight house there. I labeled and sealed the samples and took them into the freight office and turned them over to Agent Hartwell at Buffalo the following morning.

(Four bottles marked Governments Exhibits 48, 49, 50 and 51 for Identification.)

[fol. 92] PEARLY B. HARTWELL, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I have seen Government's Exhibits 48, 49, 50 and 51 for Identification. I am Prohibition Agent and was in October and November, 1926, working out of Buffalo. I saw the four exhibits for identification at Seneca Falls, N. Y., on the morning of October 17th, 1926. Prohibition Inspector Sanborn gave them to me. In the presence of other agents, I took them from Seneca Falls to Buffalo and gave them to Mr. Williams, the Government Chemist.

SAMUEL M. BALDWIN, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

In October, November and December, 1926, I was Chief Clerk at the Freight House of the Lehigh Valley Railroad at Geneva.

(Two shipping orders dated October 15th, 1926, attached together, marked as Libellant's Exhibit 52 for Identification.)

I first saw the first of Government's Exhibit 52 for Identification on October 15th when it was signed by Beales, the freight agent. The other I saw on October 16th when I [fol. 93] made it up and it is in my handwriting, except the shipper's signature. I took Exhibit 52 for Identification from the files of the Railroad at Geneva, N. Y.

Cross-examination.

By Mr. Newton:

I was in this Court Room some time last April, and there was a man hereby the name of Lagier, I believe, and I did not know the man and had never seen him before.

Redirect examination.

By Mr. Templeton:

I did see the man who signed the shipping order, Exhibit 52.

Percy W. Darby, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am Vice-President of the Marine Trust Company at Buffalo, N. Y. I have been connected with the company for 40 years and during that time have had occasion to examine handwriting of persons on checks and other instruments in the bank, for the purposes of identification and I have been a witness in Courts with reference to the com- [fol. 94] parison of handwriting for a period of 20 years.

Q. I show you Government's Exhibits 12, 41, 9, 10 and 11 and ask you to examine the signature signed to each of those exhibits.

Mr. Newton: I object to it on the ground that the evidence is incompetent and proper foundation has not been laid for the admission of answer.

The Court: Overruled.

Mr. Newton: Exception.

A. Ludwig Baur.

Q. I now show you Exhibit 25 and call your attention to the name written in ink below the words "Standard Solvents Chemical Corporation By" and ask you whether in your opinion the hand that wrote the name "Ludwig Baur" in the five exhibits you have examined, was the same hand that wrote the name "R. Beck"?

Mr. Newton: Same objection as to the last objection.

The Court: Overruled.

Mr. Newton: Exception.

A. In my opinion it was written by the same hand.

Q. I show you Government's Exhibit 26 for Identification and ask you to examine the writing opposite the words "Standard Solvents Chemical Corporation, R. Beck, President", and ask you whether in your opinion the hand that wrote the name "Ludwig Baur" was the same hand that wrote the writing I have just read.

[fol. 95] Mr. Newton: Same objection as to the last question.

The Court: Overruled.

Mr. Newton: Exception.

A. In my opinion it was written by the same hand.

Mr. Templeton: I now offer this Exhibit for Identification 26 in Evidence.

Mr. Newton: Same objection.

The Court: Overruled.

Mr. Newton: Exception.

(Exhibit 26 for Identification received and marked Libellant's Exhibit No. 26.)

Q. This exhibit, which is now Exhibit 26 in Evidence, is the application of the Standard Solvents Chemical Corporation, 1122 W. Genesee Street, Syracuse, New York, for telephone service at 1122 W. Genesee Street, Syracuse, New

York, as a place of business. It is signed "Standard Solvents Chemical Corporation, R. Beck, President."

I now ask you whether the signature of "R. Beck" on Government's Exhibit 25 is in the normal hand of the person who wrote those other signatures, or if it is a disguised hand?

Mr. Newton: I object to that as incompetent, improper, and no foundation laid for the question, no proper foundation laid for the question, and is immaterial.

The Court: Objection overruled.

[fol. 96] Mr. Newton: Exception.

A. I should say it is a disguised hand.

Q. I now call your attention to the Government's Exhibit 26 and ask you whether the handwriting "Standard Solvents Chemical Corporation, R. Beck, President," is all or part of it in a disguised hand?

Mr. Newton: Same objection as to the last question.

The Court: Same ruling.

Mr. Newton: Exception.

A. I should say it is a disguised hand.

Q. After examining all of the exhibits to which I have called your attention, and having the explanation in mind, I now show you Government's Exhibit 27 for Identification and ask you to examine the words "John Mueller," I now ask you, after such examination, whether in your opinion the hand that wrote the signature "Ludwig Baur" and "R. Beck" on the exhibit which you have examined, was the same hand that wrote the signature "John Mueller"?

Mr. Newton: Objected to on the same grounds as before.

The Court: Objection overruled.

Mr. Newton: Same objection.

A. In my opinion it was the same hand.

Mr. Templeton: I now offer Exhibit 27 for Identification in Evidence.

Mr. Newton: Same objection.

[fol. 97] The Court: Overruled.

Mr. Newton: Exception.

(Libellant's Exhibit 27 for Identification received in evidence and marked Exhibit No. 27.)

(Yellow sheet of paper marked Government's Exhibit 53 for Identification.)

Q. I show you Government's Exhibit 53 for Identification, and ask you if you have ever seen that paper before?

A. I have.

Q. I now ask you if the hand that wrote "Ludwig Baur" on the various exhibits you have testified to, was the same hand that wrote "John Mueller" on Exhibit 53 for Identification?

Mr. Newton: Objected to on the ground it is incompetent, immaterial, and that the proper foundation has not been laid for the answer.

The Court: Objection overruled.

Mr. Newton: Exception.

A. In my opinion it was the same hand.

Mr. Templeton: I offer this Exhibit 53 in Evidence.

Mr. Newton: The same objection on the same ground.

The Court: Overruled.

Mr. Newton: Exception.

(Libellant's Exhibit 53 for Identification received in evidence and marked Libellant's Exhibit No. 53.)

[fol. 98] Q. I now ask you if you saw any person sign that name "John Mueller" on Exhibit 53?

Mr. Newton: I object to that, and I ask the right in connection with my objection to ask a preliminary question.

The Court: You may ask.

Preliminary examination.

By Mr. Newton:

Q. That signature was made in Court in your presence when you were testifying as a witness, wasn't it

A. Yes, sir.

Q. Did you request the party who signed that name to write his signature in Court here at this time?

A. I requested him to write the words "John Mueller". I did not request him to sign his signature.

Q. And you did that specially for the purpose of comparing it with the other handwriting?

A. Yes.

(Last question by Mr. Templeton read, as follows:

"Q. I now ask you if you saw any person sign that name 'John Mueller' on Exhibit 53?")

Mr. Newton: I object to that question on the ground it is incompetent and inadmissible.

The Court: Overruled.

Mr. Newton: Exception.

[fol. 99] Direct examination.

Resumed by Mr. Templeton:

(Last question by Mr. Templeton again read as follows):

"Q. I now ask you if you saw any person sign the name 'John Muller' on Exhibit 53?"

A. I did.

Q. And who did sign it?

Mr. Newton: Same objection.

The Court: Objection overruled.

Mr. Newton: Exception.

A. The man who was pointed out as Ludwig Baur.

Q. I now show you, Mr. Darby, Government's Exhibits 44, 45, 46 and 47, and ask you to examine the handwriting and signatures at the lower portion of each of these exhibits. I now ask you if the signature at the lower right hand corner of Exhibit 44 was signed by the same hand that wrote the lower left hand corner of that exhibit.

Mr. Newton: Objected to as incompetent, immaterial and that the proper foundation has not been laid for the question.

The Court: Objection overruled.

Mr. Newton: Exception.

A. I do not believe that it was.

Q. I ask you if the signature in the lower right hand [fol. 100] corner on Exhibit 45 was written by the same hand as the signature on the lower left hand corner?

Mr. Newton: I made the same objection.

The Court: Same ruling.

Mr. Newton: Exception.

A. I do not believe that it was.

Q. I ask you to examine Exhibit 46, and examine the signature in the lower right hand corner and the lower left hand corner, and ask you if those two signatures were written by the same hand?

Mr. Newton: Same objection.
The Court: Same ruling.
Mr. Newton: Exception.

A. I think they were.

Q. I show you Exhibit 47 and ask you if the signature written at the lower right hand corner was written by the same hand that wrote the signature in the lower left hand corner?

Mr. Newton: Some objection.
The Court: Same ruling.
Mr. Newton: Exception.

A. In my opinion it was.

Q. I show you Government's Exhibit 52 for Identification, consisting of two sheets, and ask you to examine the signatures in the lower left hand corner of both sheets, and [fol. 101] I ask you now to compare the signature on the lower left hand corner of Exhibit 52 with the signatures in the lower left hand corner of Exhibits 45 and 44, and ask you to say whether or not these signatures in the lower left hand corner of Exhibit 52 for Identification was or was not written by the same hand that wrote the signatures in the lower left hand corner of Exhibits 46 and 47.

Mr. Newton: Same objection.
The Court: Same ruling.
Mr. Newton: Exception.

A. In my opinion the signatures on all of these in the lower left hand corner were written by the same hand, with the exception of Exhibit 52.

Q. The first sheet of Exhibit 52 for Identification?

A. That one I do not think I could pass upon because there is not enough there really to bring out character.

Q. The second part in the lower left hand corner of the second sheet of Exhibit 52 for Identification, what would you say as to that?

A. I believe that it was made by the same hand that wrote the other two.

Mr. Newton: I have the same objection and the same ruling to the last question.

The Court: Yes, same ruling.

Mr. Newton: Exception.

Mr. Templeton: I now offer Exhibit 52 for Identification in Evidence.

[fol. 102] Mr. Newton: Same objection as to the last.

The Court: Overruled.

Mr. Newton: Exception.

(Libellant's Exhibit 52 for Identification received in evidence and marked Libellant's Exhibit No. 52.)

Cross-examination.

By Mr. Newton:

It is absolutely possible for me to be mistaken in my opinion, as arrived at through experience in comparisons.

Q. But it comes down to a guess on the part of the man who gives it. He guesses somewhat he has to say about an opinion.

A. I don't know, I think it is a little bit stronger than that.

Redirect examination.

By Mr. Templeton:

Q. You have certain rules that you go by in making comparisons of signatures, and after the application of those rules to these papers as you have indicated, it is your opinion that the handwriting is as you have described?

A. That is my opinion. I cannot say anything more than that.

[fol. 103] JEREMIAH J. GREEN, called as a witness by libellant, testified as follows:

Direct examination.

By Mr. Templeton:

Mr. Templeton: I wish to read a small portion of Exhibit 52.

Mr. Newton: I make the same objection as before because shortly motions will be made at the close of all the evidence.

The Court: Overruled.

Mr. Newton: Exception.

Mr. Templeton (reading from Exhibit 52): October 15th, 1926, Geneva, N. Y., from S. V. Mervin Company, consignee, to John Phillips & Company, Chicago, Ill., 12th Street Team Track delivery. B. & O. Delivery, Car I. C.-330216. One carload Honey strained in metal cans. Jacketed. 30,000. One carload strained Honey in metal cans, jacketed, 30,000 weight. Geneva, N. Y., October 15th, 1926 from S. Mervin Company, consignee, 12th Street Team Track delivery. B. & O. delivery. Car initial r d g 16297. Shippers load and count.

Mr. Templeton: I ask to have these ten bottles marked for identification.

(Ten bottles marked Libellant's Exhibits 54 to 63, inclusive for Identification.)

I, Mr. Green, am a prohibition officer and was assigned [fol. 104] in 1926 at Chicago, Ill. Have been in the Government service over thirty years.

Q. Did you make an investigation of any shipment at Chicago which had come from Geneva in 1926?

Mr. Newton: Objected to on the ground it is incompetent and immaterial and not binding on respondents.

The Court: Overruled.

Mr. Newton: Exception.

A. In October, 1926, I examined the contents of a car, Illinois Central 330216 and a Reading car 16297.

Q. Did you see some cars in Chicago in October?

A. No, sir, I did not see those two cars.

Q. Did you examine Illinois Central car 330216 in the Government Warehouse in Chicago in October, 1926 and also Reading car 16297?

Mr. Newton: Same objection as to the last question.

The Court: Overruled.

Mr. Newton: Exception.

A. Yes, sir.

Both cars were sealed when I first saw them. They were opened by some employees of the United States Marshall or another prohibition agent in my presence.

Mr. Newton: May I have it stipulated that I have objection to this testimony on the ground stated, with an exception?

[fol. 105] The Court: It may so show on the records.

The Illinois Central car No. 330216 contained 50 drums and Reading car 49 drums. They were unloaded in my presence. I took samples of from five drums of each car. Government's Exhibits 54 to 63, inclusive were marked by me for identification and those are the samples.

(Exhibits 57, 60, 55, 56 and 61 are from car 330216 and the other five exhibits are from the other car.)

We sealed them where we took the samples and delivered them to the Chemical Laboratory in Chicago on the same day. I do not recall the name of the chemist to whom they were delivered.

Mr. Templeton: I offer in evidence this drum as one seized at Cayuga by the sheriff and taken to his office at Auburn, N. Y. and brought here from there.

Mr. Newton: I object to it on the ground that proper foundation for its admission in evidence has not been laid and not binding on the respondents.

The Court: Received.

Mr. Newton: Exception.

(Drum marked Libellant's Exhibit No. 64.)

Mr. Templeton: I call attention to the fact that on top [fol. 106] of the drum is P. I. W. cast into its top and I. C. C. 55.

James A. Connelly, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I live in Sharon, Pa., and am Vice-President and Sales Manager of the Petroleum Iron Works Company, and have been Sales Manager for the past six years. The company manufactures steel tanks, barrels, cars and buildings. I have examined Government's Exhibit 64. We put on all

our drums the regular I. C. C. marking and our trade-mark which is P. I. W. The '16' means the gauge sheet; the 55 means 55 gallons capacity and 26 means the year 1926. We manufacture in excess of 50,000 drums a year similar to Government's Exhibit 64. That is a standard I-beam drum. When the drums leave our plant 95% of them are painted black and white; some have a white head and some have a black head. In 1926 we delivered between 7,500 and 8,500 drums to the Waterloo Distilling Corporation. We sell drums all over the United States. The 55 gallon drum, our firm makes in such large quantities, resembles Government's Exhibit 64 in every particular. In the year 1926 we sold 52,472 of the drums similar to Exhibit 64.

Contract on behalf of the Waterloo with our company for the drums was made by letter signed Mr. Rodenberg and [fol. 107] another letter of November 3, 1926 signed by Ludwig Baur.

Mr. Newton: I move to strike out as incompetent and immaterial this last statement.

The Court: Denied.

Mr. Newton: Exception.

In the year 1926 we sold over 15% of our total output of these drums to the Waterloo Distilling Corporation. At that time we had not solicited the alcohol trade very much. In 1926 the majority of the 5 B drums similar to Exhibit 64 sold by us were sold to alcohol companies, none of which, I believe, were located in the State of New York.

Fred J. Tanner, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I was at the Waterloo Distillery last Saturday. This was April, 1928. Before going there I examined the marking on the drums on the Court Room here, Government's Exhibit 64. I found 3,099 drums there in the bonded warehouse, of which was there as early as October, 1926, 28 filled July 19th, 1926, 34 July 21st, 1926, 54 July 21st, 1926, 38 July 21st, 1926, 23 July 22nd, 1926. There were 905

drums there prior to October 16th, 1926. Those drums there are like Government's 64 as to markings, appearance and shape.

[fol. 108] DONALD V. MURPHY, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

In October, November and December, 1926, I was in the employ of the Government, Prohibition Department, at the Buffalo Office. I made an investigation of the Waterloo Distillery's sales some time in the month of November or December, 1926 and I made my report of my investigation to my Chief.

Mr. Templeton: I offer this report of December 1st, 1926 in evidence.

Mr. Newton: I object to the part of the report which pertains to R. Beck, a broker at 519 University Building, Syracuse, N. Y., upon the ground that the regulation as to any information R. Beck gave is incompetent, that the regulation adopted by the Department is null and void as to any of the respondents and is null and void even as to R. Beck, as a matter of law.

The Court: Received.

Mr. Newton: Exception.

(Report of Donald V. Murphy, dated December 1, 1926, marked Libellant's Exhibit No. 65.)

Exhibit 65 is the original copy of the report signed by me.

[fol. 109] (Mr. Templeton reads Exhibit 65 to the Jury.)

This inventory was made by me.

Q. Have you seen either of the Becks before you visited the place in November, 1926?

Mr. Newton: I object to it as incompetent and immaterial.

The Court: Overruled.

Mr. Newton: Exception.

A. I had seen the tall one, Joe Beck at Port Chester, N. Y., W. H. Long & Company. This was 1924 or 1925.

In November, 1926 I saw both R. Beck and Joe Beck at the Standard Solvents on West Genesee Street.

Mr. Newton: I move to strike out the evidence that the witness saw Joe Beck in 1924 or 1925 as incompetent, immaterial, too remote and not within the pleadings herein issued.

The Court: Overruled.

Mr. Newton: Exception.

Cross-examination.

By Mr. Newton:

It is my understanding that when I was at Syracuse making this investigation I learned that J. Beck was president of the Standard Solvents & Chemical Company. When I first saw him he gave me information but not as much as [fol. 110] I wanted. What he gave he volunteered. Then I saw R. Beck and at first he refused to give me any information and then I told him in substance that if he did not give me the information I desired I would report the matter to the Waterloo Distilling Corporation and then he gave me the list that is in my report. All the alcohol which I found at the Standard Solvents was completely denatured alcohol and was right there on the premises. There were 723 drums of C. D. No. 5, 11 drums of No. 2 and 6 drums of No. 6. R. Beck informed me that he did not like to give the names of these customers, that it was hard to get customers and he didn't want any list of his customers floating around the prohibition offices or something like that and that he knew the experience before where prohibition agents would want to give a list of customers to competitors. I couldn't say that he did not intimate to me by action or words that he would give phony names of sales, of people to whom he had sold, so that his real customers could not be interfered with. I can't remember any exact actions. I would not say he did not give me that impression. I had my own ideas about it. These 740 drums, I

was satisfied contained completely denatured alcohol. They had received from the Waterloo 1219 drums and accounted for 1214 drums. The report shows that between October 11th and November 23rd, inclusive, the Standard Solvents Company received 1944 drums of C. D. No. 5 from the Waterloo, plus 11 C. D. No. 2 and 6 drums of No. 6 and during that same time, between October 14th and November 23rd they claim to have sold 1219 drums of C. D. [fol. 111] No. 5 to R. Beck. That would leave 725 which should have been on the premises. There was a discrepancy of two drums by leakage. R. Beck accounted to me that he received the 1219 drums but never accounted to me for 1214. I found all the containers at the Standards Solvents Company, which I have mentioned with all necessary markings on them. I knew by hearsay of the raiding of the Excelsior Products Company, 217 Walton Street, in Syracuse which had a capacity of 25,000 gallons. I was personally present at a seizure of a still in Syracuse which redistilled alcohol from hair tonic. It would be cheaper to use pure alcohol in the first instance, without denaturing it, for beverage purposes. It would be easier and more profitable. I know from my investigation that bootleggers would get ahold of completely denatured alcohol and give fictitious names and also at this time get from dealers specially denatured alcohol and give fictitious names and addresses and they did this at the very time of my investigation here. I never entered any complaint against the Waterloo Distillery.

Redirect examination.

By Mr. Templeton:

Q. Will you state the reason pure grain alcohol cannot be diverted as easily as specially denatured alcohol?

Mr. Newton: I object to it as improper on redirect ex- [fol. 112] amination. He is not qualified unless he knows from experience.

The Court: Overruled.

Mr. Newton: Exception.

A. In order to transport or possess pure alcohol you must have a permit from the Government.

No permit is required to transport C. D. 5 but is required for S. D. 40 and for pure grain alcohol which can only be shipped under bond, by a bonded automobile, or by a bonded railroad and no bond whatever is required for shipping C. D. 5.

Recross-examination.

By Mr. Newton:

I have always understood that the reason the Government doesn't require any permit for completely denatured alcohol, C. D. 5, is because it cannot be redistilled for beverage purposes.

Frank N. Himpler, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

(Witnesses Himpler, Kennedy, Clark, Penoyer and Griffin, sworn at one time.)

Mr. Newton: Objection to this testimony as it is given [fol. 113] by these six witnesses just sworn is made upon the ground it is incompetent and no proper foundation laid for it and not binding upon any of the respondents.

The Court: Overruled, and an exception.

In October or November, 1926 I did not purchase 21 drums of completely denatured alcohol from R. Beck or from the Standard Solvents Chemical Company. In the year 1926 I used about five or six drums but did not buy it from R. Beck or the Standard Solvents at Syracuse.

Cross-examination.

By Mr. Newton:

I never had any transaction with the Standard Solvents & Chemical Company, nor with the Waterloo Distilling Corporation.

JOSEPH F. KENNEDY, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I operate the Court House Garage, 513 South State Street, Syracuse, N. Y., and in October, November and December, 1926, I did not purchase 50 drums of completely [fol. 114] denatured alcohol or any alcohol from R. Beck.

Cross-examination.

By Mr. Newton:

I never had any transaction of any kind with the Standard Solvents Chemical Company of Syracuse nor with the Waterloo Distilling Corporation.

HENRY H. CLARK, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I had charge of the garage at 1512 East Main Street, Syracuse, N. Y., in 1926. In October or November, 1926, I did not purchase 25 drums of completely denatured alcohol from R. Beck or any drums from R. Beck at that time. Did not use any in 1926.

Cross-examination.

By Mr. Newton:

I never had any business transaction with the Standard Solvents Chemical Company at Syracuse or with the Waterloo Distilling Corporation.

[fol. 115] LESLIE PENOYER, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

In October and November, 1926, I was the proprietor of the Renn Garage at 1176 South Salina Street, Syracuse, N. Y. and did not during that time purchase 25 drums of denatured alcohol from R. Beck and never purchase any completely denatured alcohol from him, or any alcohol.

Q. How much did you use in 1926?

Mr. Newton: Objected to as immaterial.
The Court: Overruled.
Mr. Newton: Exception.

A. One drum.

Cross-examination.

By Mr. Newton:

I never had any business transaction with the Standard Solvents Chemical Corporation at Syracuse, nor with the Waterloo Distilling Corporation.

[fol. 116] WILLIAM S. GRIFFIN, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

In 1926 I operated the Griffin Garage, at 1835 South Avenue, Syracuse, N. Y. In October or November, 1926 I did not purchase from R. Beck, 25 drums of completely denatured alcohol.

Q. About how many drums did you use in 1926?

Mr. Newton: Objected to as immaterial.
The Court: Overruled.
Mr. Newton: Exception.

A. About five or six.

Cross-examination.

By Mr. Newton:

I never had any business transaction with the Standard Solvents & Chemical Company of Syracuse or with the Waterloo Distilling Corporation.

THOMAS C. PICKARD, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

In October, November and December, 1926, I ran the [fol. 117] James Street Garage, in the Town of Dewitt, just outside of Syracuse. I did not purchase 35 drums of alcohol in October or November, 1926, from R. Beck.

Q. Did you use any alcohol in 1926?

Mr. Newton: I object to that as immaterial.
The Court: Overruled.
Mr. Newton: Exception.

I think I bought a drum of completely denatured alcohol in 1926, from Mills Oil Company.

Cross-examination.

By Mr. Newton:

I never had any real personal transactions with the Standard Solvents & Chemical Co. of Syracuse, or with the Waterloo Distilling Corporation.

JOSEPH A. PLOUFFE, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

In 1926, I operated the Ennis & Plouffe Garage, in Syracuse. In October or November, 1926, I did not purchase

thirty-eight drums of completely denatured alcohol from R. Beck.

[fol. 118] Q. What did you use in the year 1926?

Mr. Newton: Objected to as immaterial.
The Court: Overruled.
Mr. Newton: Exception.

A. Probably five or ten gallons for our own car use.

Cross-examination.

By Mr. Newton:

I never had any business transactions with the Standard Solvents & Chemical Co. of Syracuse, or with the Waterloo Distillery Corporation. In November, 1926, my name was listed in the telephone book in Syracuse.

WILLIAM T. ROONEY, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I operated the Day and Night Garage, at 306 Madison Street, Syracuse, in the year 1926. I did not purchase twenty drums of C. D. 5, completely denatured alcohol, from R. Beck, in October or November, 1926. I use about fifteen to thirty drums a year.

[fol. 119] Cross-examination.

By Mr. Newton:

I did not have any business transaction in November, 1926, with the Standard Solvents & Chemical Company of Syracuse, or with the Waterloo Distilling Corporation. In November, 1926, my garage was listed in the telephone book of Syracuse.

EDWARD N. BECK, JR., a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I own the Liberty Garage, 212 Burnett Avenue, Syracuse, N. Y. I did not purchase twenty drums of completely denatured alcohol from R. Beck, in October or November, 1926. I use about seven drums a year.

ANDREW A. SPEACH, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I operate Andy's Garage. I did not purchase twenty drums of completely denatured alcohol from R. Beck, in October or November, 1926. I use no alcohol.

[fol. 120] J. DWIGHT ATWATER, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I run a gasoline station at 1507 W. Genesee St., Syracuse, N. Y. I did not purchase fifty drums of completely denatured alcohol in October or November, 1926, from R. Beck. I use twelve barrels a year.

CHESTER BAKER, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I operate the King Street Garage, 105 King Street, Syracuse, N. Y. I did not purchase twenty-five drums of com-

pletely denatured alcohol from R. Beck, in October or November, 1926. I use about two barrels a year.

FRED J. FAGAN, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am the owner and operator of the Fagan Garage, 747 South Cross Avenue, Syracuse, N. Y. In October or No- [fol. 121] vember, 1926, I did not purchase twenty-five drums of completely denatured alcohol from R. Beck, or Joe Beck. I only use five gallons in the winter for my own cars.

HARRY KEMPER, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am part owner of Kemper Bros. Garage, Camilus, N. Y. I did not purchase from J. Beck or R. Beck, on November 9th, 1926, or at any other time, twenty drums of completely denatured alcohol, and never received an invoice from R. Beck, for twenty drums of alcohol.

VICTOR WILD, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am the operator of the First Ward Garage, 1012 Wolf Street, Syracuse, N. Y. I did not purchase in October, 1926, from R. Beck, ten drums of completely denatured alcohol, or received an invoice from him or anybody else therefor. I use from one to three barrels a year.

[fol. 122] BERNARD MOORE, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am the operator of Moore Bros. Service Station, 726 Wolf Street, Syracuse, N. Y. I did not purchase from R. Beck on November 23, 1926, or at any other time, nineteen drums of completely denatured alcohol, and I never saw R. Beck before April, 1928, and I never received an invoice from him or anybody at my garage. I use from ten to twelve drums a year.

JOSEPH SIMONE, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am the operator of the Lodi Garage, 1431 Lodi Street, Syracuse, N. Y. I did not on November 17, 1927, or at any other time purchase 20 drums of completely denatured alcohol from R. Beck, and never saw him before April, 1928. I never received an invoice for 20 drums of alcohol. I use from 5 to 6 drums a year.

[fol. 123] CHARLES BOYD, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I operate the Boyd Garage, 703 Fayette Street, Syracuse, N. Y. I did not on November 30, 1926, or at any other time purchase from R. Beck, 35 drums of completely denatured alcohol, and do not recollect seeing him before April, 1928, in this court room. I do not use any alcohol. I never received an invoice for 35 drums of completely denatured alcohol from R. Beck, or anybody else.

THOMAS PATERSON, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am the operator of the Paterson Garage, Chittango, N. Y. I did not on November 8, 1926, or at any other time, purchase 18 drums of completely denatured alcohol from R. Beck, and never saw him before April, 1928, and then here in court. I never received an invoice for 18 drums of alcohol from him or anybody at my garage. I use about two barrels a year.

[fol. 124] HENRY SEARLES, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I operate the Lakeside Garage, Brewerton, N. Y. I did not in November, 1926, or at any other time purchase 26 drums of completely denatured alcohol from R. Beck, and never received an invoice for 26 drums. I use about one and one-half to two barrels a year.

JOHN C. CULLEN, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I run the Adams Garage, 601 Madison St., Syracuse, N. Y. I did not in November, 1926, or at any other time, purchase 41 drums of completely denatured alcohol, from R. Beck, and never received an invoice therefor. I use from two to three drums a year.

WILLIAM ENGLISH, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

[fol. 125] I am the proprietor of the Wolf Street Garage, 1000 Wolf Street, Syracuse, N. Y. I did not purchase from R. Beck on November 6, 1926, or at any time, 8 drums of completely denatured alcohol, and never saw him before April, 1928, in this court. I never received an invoice of 8 drums from him. We never used alcohol, just had a repair garage.

FRANK SONTHEIMER, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I operate the Adams South Salina Service Station, Syracuse, N. Y. I did not on November 23, 1926, or at any time, purchase 10 drums of completely denatured alcohol from R. Beck. I never saw him before, except in court here, in April, 1928. I used about 80 drums in 1927.

CARL BUSCH, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I operate the C. Busch, 812 South Clinton St., Syracuse, N. Y. I did not purchase in November, 1926, or at any other time, from R. Beck, 24 drums of completely denatured alcohol, and never received an invoice for the same. I use about one drum a year.

[fol. 126] TIMOTHY BEENEY, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

In November, 1926, I was the purchasing agent of the Baldwinsville Gas Company, Baldwinsville, N. Y. On November 9, 1926, or at any time I did not purchase from R. Beck 30 drums of denatured alcohol or receive any invoice therefor from him or anybody. I use from one to two gallons a year.

Mr. Newton: Respondents move to strike out the evidence given by these witnesses, owners or proprietors of garages, upon all the grounds stated in the objection to the testimony at the start.

The Court: Motion denied and an exception.

(Bills of Bijou Forwarders, Inc., for shipments to Standard Solvents of Syracuse, for the months of October, November and December, 1926, three sheets, marked as one exhibit, Libellant's Exhibit 66, and read to the jury by Mr. Templeton.)

WALTER J. HORNER, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

[fol. 127] (Two packages of papers marked respectively, Libellant's Exhibits 67 and 68, for Identification.)

I reside in Syracuse, N. Y. I am car clerk connected with the Freight Office of the D. L. & W. at Syracuse. The Libellant's Exhibits 67 and 68 for Identification were taken from the files of my company.

(Two papers marked Libellant's Exhibits 69 and 70 for Identification.)

Libellant's Exhibits 69 and 70 for Identification came from the files of my railroad at Syracuse. They are ship-

ping orders. Exhibit 70 for Identification is under date of November 15th and Exhibit 69 for Identification is under date of November 12th. I stamped those shipping orders. At the trial in April last I identified a Mr. Lagier as the man who brought those two shipping orders to me and I believe he brought the other orders, Government Exhibits 67 and 68 for Identification.

Mr. Templeton: I offer Exhibits 67, 68, 69 and 70 for Identification in Evidence.

Mr. Newton: Respondents object upon the ground that the proper foundation has not been laid for their introduction in evidence against them.

The Court: Overruled.

Mr. Newton: Exception.

(Libellant's Exhibits 67, 68, 69 and 70 for Identification, [fol. 128] marked Libellant's Exhibits 67, 68, 69 and 70 in Evidence.)

Cross-examination.

By Mr. Newton:

I do not know what went into any of these cars which are designated in these exhibits. I testified before, in substance: "I believe Lagier is the man who gave me everyone of those thirty bills". I said just now that I believed he did. I don't know anything about the Bijou Forwarders, Inc., only that they just handed in the bills to me.

Leroy J. Birtell, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am and was in October and November, 1926, chief clerk and Yard Master of the D. & H. Railroad at Greenridge, Pa. I don't recall of my own recollection that car No. 87951 mentioned in Government's Exhibit 70 was in our yard. I kept a record of the cars which I had in our yard

in October and November, 1926. The book I refer to was kept in the usual course of business of the Company. Lehigh Valley car 87951 was in our yard November 18, 1926. I next checked it on the 19th. When I checked it on the first [fol. 129] day, it was sealed and on the 19th it was loaded; on the 20th it was loaded and on the 22nd. The record doesn't show anything on the 23rd, but there was no work on the Sunday between. Erie car No. 90815 mentioned in Government's Exhibit 69 dated November 12th, the record shows car was found November 15, 1926 and the record shows nothing as to the condition of the car then, but shows on November 16th loaded with sauerkraut, and the same on the 17th and 18th, and on the 20th and 22nd showed loaded. I got the record of sauerkraut from the inbound waybill.

Cross-examination.

By Mr. Newton:

When I say sauerkraut loaded, I simply say that because the car was sealed. I don't know whether the car was actually loaded or not.

Mr. Newton: I move to strike out the evidence of the witness on the grounds that the proper foundation has not been laid, for its admission against the respondents.

The Court: Motion denied.

Mr. Newton: Exception.

(Three records marked Libellant's Exhibits 71, 72, and 73, and three papers marked Libellant's Exhibits 74, 75 and 76 for Identification.)

[fol. 130] Edward F. Rosen, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am Chief Clerk for the D. & H. at Scranton, where I received a subpœna with reference to Lehigh Valley car 87951. I took Government's Exhibits 74, 75 and 76 for

Identification from the files of my office and brought them here.

Mr. Newton: I move to strike out the evidence on the ground that the proper foundation for the admission against the respondents has not been laid.

The Court: Motion denied.

Mr. Newton: Exception.

Fred S. Smith, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am and was in November, 1926, Freight Agent for the Delaware & Hudson Company, at Scranton. I saw Government's Exhibit 70 for Identification in the freight office November 22, 1926. Government's Exhibit 73 for Identification was taken from the files of the Railroad Company in my office. I did not see him take it out. I told him to get [fol. 131] the records ready. He had an exact copy of the same thing. Then we packed all the records.

Mr. Templeton: I offer Exhibits 74, 75 and 76 for Identification in Evidence.

Mr. Newton: Respondents object on the ground the proper foundation has not been laid for the admission.

The Court: Received.

Mr. Newton: Exception.

(Libellant's Exhibits 74, 75 and 76 for Identification, marked Libellant's Exhibits 74, 75 and 76 in Evidence.)

Mr. Templeton: I offer Libellant's Exhibits 71, 72 and 73 for Identification in Evidence.

Mr. Newton: Same objection.

The Court: Received.

Mr. Newton: Exception.

(Libellant's Exhibits 71, 72 and 73 for Identification, marked Libellant's Exhibits 71, 72 and 73 in Evidence.)

Q. I ask you to trace the car under Exhibits 71, 72 and 73.

A. The record shows the car was shipped at Greenridge November 11th and re-shipped November 22nd to Chicago, Illinois.

Mr. Newton: I move to strike out the evidence of the last witness on the ground proper foundation has not been laid for its admission against the respondents.

The Court: Motion denied and exception.

[fol. 132] Cross-examination.

By Mr. Newton:

I do not know of my own knowledge who shipped that car. I, myself did not see this particular car or the contents of it, or know anything about it. My work is purely office work. Exhibit 71 was presented to me personally by some man or some human being and I do not know who that person is.

Thaddeus Johnston, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am Captain of Police of the New York, Chicago and St. Louis Railroad, at Chicago, Illinois.

(Two papers marked Libellant's Exhibits 77 and 78 for Identification.)

I saw Government's Exhibits 77 and 78 for Identification at the freight house in Chicago on 12th Street on November 26, 1927. The markings on Exhibit 77 for Identification were made by me. It is a waybill for Lehigh Valley car 87951 of carlot shipment. I investigated Lehigh Valley car 87951 mentioned in Exhibit 77, destination Chicago. I found it on the 12th Street track of the Nickel Plate. The car was right ahead of a Lehigh Valley car, with one door open.

[fol. 133] As I stated, the door was open on this car, and it contained some drums, and a strong odor of alcohol in there from it. That is when I went up to get the waybill at the office of the Nickel Plate Railroad to see what it was billed as, and I got the waybill covering car 90185, being Government's Exhibit 78.

After getting Exhibit 78 with reference to car No. 90185, I notified the Government Prohibition Agent and waited until he came. He opened one of the drums inside the door and took some samples out, put a stick in and smelled of the stick and tasted it. He then went to the rear end of the car and took samples out of another drum. With reference to car 87951 mentioned in Exhibit 77 for identification, I showed the paper marked Exhibit 77 for Identification to the Government Agents and I put marks on it after they opened the car.

Mr. Templeton: I now offer in evidence Libellant's Exhibits 77 and 78 for Identification.

Mr. Newton: I object to them upon the ground there is not any foundation laid for the admission of them against the respondents, not connected by evidence, and incompetent.

The Court: Objection overruled.

Mr. Newton: Exception.

(Libellant's Exhibits 77 and 78 for Identification received in Evidence and marked Libellant's Exhibits 77 and 78.)

[fol. 134] Alfred Johnson, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am and was in November, 1926, a Prohibition officer at Chicago. I heard the testimony of the last witness and am the Prohibition Agent referred to by him.

(Two bottles identified by witness containing samples taken from Lehigh Valley car 87951 I will have marked as Libellant's Exhibits. Two bottles marked Libellant's Exhibits 79 and 80 for Identification.)

I recall going to Lehigh Valley car 87951 in November, 1926, and I took samples with Agent Wolff from two separate drums, and the Government's Exhibits 79 and 80 for identification are the bottles in which samples were put from two separate drums. We had already taken the other two from the Erie car. Agent Wolff and I took them to the Prohibition Office. On the 29th Agent Wolff, with me, delivered them to Chemist Fonner.

(Two bottles marked Libellant's Exhibits 81 and 82 for Identification.)

Exhibits 81 and 82 for Identification contain the samples Agent Wolff and I took from the two drums in Erie car 90185. The samples were taken to the Chemist, as I said, on the 29th. There were 50 drums in Erie car 90185 and [fol. 135] they resembled the drum, Exhibit 70. There were 50 drums in Lehigh Valley car 87951 and they resembled the drum, Exhibit 64.

Mr. Newton: Respondents move to strike out the evidence of the witness on the ground that the proper foundation has not been laid for its admission.

The Court: Motion denied.

Mr. Newton: Exception.

John W. Fenner, a witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am Chemist for the Prohibition office at Chicago, Illinois, and was in November, 1926. Libellant's Exhibits 79, 80, 81 and 82 for Identification were delivered to the laboratory on November 29th by Agent Wolff. I analyzed these samples, and they were specially denatured alcohol number 40.

Mr. Temple: I now offer these four exhibits in evidence.

Mr. Newton: Objected to upon the ground the proper foundation has not been laid.

The Court: Overruled.

Mr. Newton: Exception.

(Four bottles, Libellant's Exhibits 79, 80, 81 and 82 for Identification, marked Libellant's Exhibits 79, 80, 81 and 82 [fol. 136] in Evidence.)

Libellant's Exhibits 54 to 63, both inclusive, for Identification, were delivered to the laboratory by Agent Green and received by me on October 21st, 1926. I made an analysis of the contents of the ten exhibits. They were specially denatured alcohol No. 40.

Mr. Newton: I move to strike that out on the grounds stated in my last objection.

The Court: Motion denied.

Mr. Newton: Exception.

Mr. Templeton: I ask to have the ten samples, Libellant's Exhibits 54 to 63 for Identification received in Evidence.

Mr. Newton: Objected to upon the ground the proper foundation has not been laid as to respondents for the admission against them.

The Court: Received.

Mr. Newton: Exception.

(Libellant's Exhibits 54 to 63, both inclusive, for Identification, marked Libellant's Exhibits 54 to 63, both inclusive, in Evidence.)

[fol. 137] William O'Malley, witness for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I live at Waterloo. In October, November and December, 1926 I was employed by the Waterloo Distilling Corporation as Master mechanic in charge of the work of the plant. Master mechanic and chief engineer are the same thing. I received my orders from Mr. Baur and Mr. Rodenberg. During those months Mr. Baur was President but if anything happened that would have to be repaired anybody in the plant would come direct to me and I would take charge of it and handle the repairing required.

Cross-examination.

By Mr. Newton:

I have worked at the plant for ten or twelve years. In October, November and December, 1926, thirty-five or forty men were employed at the plant. I remember when the first denaturing was done in October, 1926, when the pump they used to pump alcohol into the denaturing plant broke down and it took two and a half or three days to fix it and during that time they denatured their alcohol on the floor of the denaturing room and when the pump was repaired they proceeded to denature as they had before. This denaturing was done with government representatives there [fol. 138] at all times. Government agents were there at all times when pure alcohol was drawn to the denaturing room to be denatured, and it was all done under their supervision. The government agent had the keys to the denaturing room and the room where the denaturants were kept. When pure alcohol was drawn to denature the seals that were on the locks that controlled the pipes had to be opened by government officials, so it was all done under government supervision through October, November and December, 1926, and January and February, 1927. I saw them completely denature alcohol there in October, November and December, 1926 and January and February, 1927.

Redirect examination.

By Mr. Templeton:

When the pump broke down I went to the denaturing plant. I was there two and one-half or three days, all day long. I don't know just how many hours of the two and a half days I spent inside of the denaturing plant. I was also at the machine shop then. I was there in the denaturing room probably three, four, five hours, taking a pump apart, and then took it to the machine shop and worked on it, which was quite a ways from the denaturing plant, where I worked on it several hours. Then I took the pump and replaced it in the denaturing plant. I was there off and on at this particular time. My brother and I did the repairing. Outside of this repair job I would go to the denaturing [fol. 139] plant probably every day. I don't know how

much time I would spend there, maybe an hour or two, maybe more and maybe only a minute or five minutes. I always went around and I would help them with the drums and things there when I didn't have anything else to do. I saw the little house that was built out near the railroad track. At Mr. Baur's request I ordered that little house built. When it was built, he put a boy and a telephone in it. It was at the entrance of the plant. There had never been any house or telephone at that point before. We built it, I think on Thanksgiving day, 1926, just after Mr. Baur came there as President. Prior to which I took orders from Mr. Rodenberg. Baur came around the latter part of September or 1st of October, 1926. He didn't order me to put in the telephone. The Company did that.

Recross-examination.

By Mr. Newton:

The little house was completed the day after Thanksgiving. After it was completed a young man eighteen or nineteen years of age was in there. Before it was built there was a lot of copper being stolen from the Distillery. The little house was so located that the person in it would have a full view of any one coming to or leaving the premises. I know this young man was placed there to act as watchman, and keep property from being stolen from the distillery, and that is what he did do. I don't know exactly when the [fol. 140] telephones were installed. After they were installed, they extended throughout the entire plant. This young man was the only one who watched the plant at that house. He was stationed there in the day time from seven to five. There were twelve or thirteen buildings at this distillery, and covered about twenty acres and were scattered all over. The telephone system was so arranged that communication could be carried on with all the different departments of the distillery. Another reason for installing the telephone system was, to save time that it took to go from one building to another.

JOHN O. TIMLIN, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am employed by the Government as one of the attorneys for the administrator in this district, and have been since September 1, 1925. I recall a time subsequent to October, 1926, when Mr. Fingerhood came to my office with reference to some revocation proceedings in connection with the Waterloo Distillery, and he talked with me with reference to the Waterloo Distillery. He talked with me at Geneva, when we had the revocation proceedings, in August, 1927.

Q. What did he say to you with reference to Miller?

[fol. 141] Mr. Newton: I object to it as incompetent under the pleadings, being after the time of the occasion of the fraud charged.

The Court: Overruled.

Mr. Newton: Exception.

A. That was in October, 1927. He came to the office of the Federal Administrator in Buffalo and said that he knew Miller, and had him there at the office to testify on an appeal. The permit had been revoked in September, 1927, and they appealed it, and then, when he came in the office in October, he said he had Mr. Miller ready to testify at the appeal, on condition that the Government present Mr. Felter and Mr. Sheehan to identify this Miller, when he presented him.

He never presented Miller to my knowledge. I was in charge of the revocation proceedings. As I recall, he said that Mr. Miller would testify that he was the one, the violator, that had shipped this alcohol from Seneca Falls, freight station, in 1926. That was the alcohol picked up by the Government at Seneca Falls, that Miller shipped, and about which the revocation proceedings were commenced.

Cross-examination.

By Mr. Newton:

Mr. Fingerhood did not say that this was about the alcohol that was shipped in October, 1926. It was all about

that case. I knew it was about that alcohol involved in a [fol. 142] shipment in October, 1926, before Fingerhood came there. The first thing he did was to file an affidavit with me. I was the judge. He was a witness there.

Mr. Newton: Reads from affidavit, as follows:

"The witness, Merle Felter, testified that a man named Miller approached him and induced him to ship alcohol out of his station, and he identified me or someone who looked like me in his own phrase as this man Miller. He said in one part of his testimony, that if it was not me, it was my twin brother.

The witness, Sheehan, the Station Agent, at Cayuga, New York, testified that a man named Miller approached him and secured a car in which alcohol was later found. Mr. Sheehan, however, did not identify me as Miller although he scrutinized me closely.

On behalf of the Company I was much concerned as to the identification by Felter, because I knew it was absolutely false, as I have never seen Felter in my life before, and was in New York the entire period, day and night, in which he says I was in Seneca Falls, which also included the time that Sheehan saw Miller at Cayuga. I produced witnesses to this fact.

Since the last testimony in the hearing, which took place about August 12th, I have discovered the said Miller, who was the man who figured in the Seneca Falls and Cayuga shipments. I have interviewed him several times and he has told me that he was the man Miller and has told me of [fol. 143] the circumstances surrounding his connection with said shipment. This statement of his shows conclusively that the Waterloo Distilling Corporation had nothing to do whatsoever with these shipments, and will aid the Government in its endeavor to get the truth regarding these shipments and all other operations in that vicinity.

This man is willing to testify personally before the proper Prohibition authorities, and his testimony will clear up conclusively many points which puzzled both the Government and deponent. It will go right to the heart of the case and should be before the authorities when they consider the case.

This testimony was not available at the time of the hearing nor had we any intimation that we could find this man, Miller.

I respectfully request that the respondent be given an opportunity to present this evidence.

Charles C. Fingerhood.

Sworn to before me this 12th day of September, 1927.
Henry McK. Erb, Notary Public."

Q. Did he not file that affidavit with you people and ask for a re-hearing?

A. I believe he filed an affidavit.

Q. And did you not grant a re-hearing?

A. He asked for a re-hearing and it was granted.

Q. On that affidavit?

A. I don't know whether it was on that affidavit; on an affidavit.

[fol. 144] Q. Well, a duplicate of it?

A. I don't know.

Q. But it was an affidavit similar to that?

A. (No answer.)

We met the fore part of October, 1927, at Buffalo, and Mr. Proper, the attorney who is here in this case, was there and present, and Mr. Cuff represented Mr. Fingerhood.

Q. Mr. Proper said this in court, did he not, at the opening:

"If the Court please, this is a re-opening to revoke permits held by the Waterloo Distilling Corporation, this re-opening being granted by letter dated September 19, 1927, signed by Andrew McCampbell, Prohibition Administrator. This re-opening was granted in pursuance to letter dated September 12, 1927, application having been made by James E. Cuff and John S. McGovern, attorneys, and affidavit of Charles H. Fingerhood, dated September 12, 1927. I think these papers should be made part of the record"?

A. I don't recall.

Q. Now, Mr. Cuff asked that the Government have present there, Mr. Sheehan and Mr. Felter, did he not?

A. Yes, he asked that.

Mr. Cuff made the following motion in substance:

"We move at this time that the Government be directed to bring in Sheehan and Felter, so that the Court can have them confronted by Miller," then, I believe Mr. Proper said, "The Government has no funds to produce Felter and

Sheehan here". Mr. Cuff then said, "We will produce the [fol. 145] funds, and get an automobile and chauffeur to get these men." I believe Mr. Proper then said, "While we are talking about this, I wish to state that Mr. Fingerhood requested the presence of Felter and Sheehan. I did not promise him, or make any promises. I said, if we could. I explained that we had no funds. I am willing to take the stand and testify. He volunteered to pay the expenses." I believe I said, the Government cannot produce them. I ruled as follows: "I can't rule that they send someone down here, I have no authority," referring to Felter and Sheehan. Mr. Fingerhood said, "We are ready to produce Mueller if you will give us the proper setting," and I then said, "The case is closed." Nobody produced Mr. Sheehan or Mr. Felter there to identify this man Mueller.

Redirect examination.

By Mr. Templeton:

Mr. Fingerhood never produced Mr. Mueller to my knowledge. He never brought anybody to me and said, "This is Mr. Mueller". So far as I know, he never produced him in the Administrator's office, and say to anybody there, "This is Mr. Mueller".

Recross-examination.

By Mr. Newton:

Mr. Fingerhood and his attorney both stated in the Pro- [fol. 146] hibition office to Mr. Proper, the attorney, and in my presence, and in that Court, that if we people produce Sheehan and Felter, he would produce Mueller for them to identify.

Redirect examination.

By Mr. Templeton:

The government asked Mr. Fingerhood to produce Mr. Mueller. I believe Mr. Proper said, "You produce Mr. Mueller, and if we feel it is necessary, we will produce Mr. Sheehan or Mr. Felter". I think Judge Proper said that to Mr. Fingerhood.

Recross-examination.

By Mr. Newton:

Q. Well, can you tell me if Mr. Proper said the Government had no funds, and they could not accept any funds from Fingerhood to produce Felter and Sheehan, how he could produce them?

A. Can I tell you how he could produce them?

Q. How he could produce them, if they did not have any funds, and you could not issue any subpœna to produce them?

A. No, I couldn't say how he could produce them.

Recross-examination.

By Mr. Newton:

Judge Proper said, "I suggest that this man Mueller [fol. 147] testify, if it is so important, and then we can see whether to send agents down to bring them here."

Recross-examination.

By Mr. Newton:

I think Mr. Cuff said, "Obviously, this man Mueller is going to testify he is the man: that he talked to Felter. He is willing to come and testify to that. Felter ought to be here. Many reasons for that. First, Felter, he said a certain station agent—unless he was sitting here, and if Mueller said 'That was the man I talked to', and if you get a look at Felter's face, you can tell whether he is telling the truth. I think that we make this clear. We will furnish the automobile, a chauffeur, with expense money in that chauffeur's hands to cover expenses of the trip. We will get those men, provided you let the agent go along. I think, a couple of agents. Let them go down and bring them here. It is the nub of this case—whether Fingerhood was in Seneca Falls that day. I don't think your Honor thinks he was, after all the splendid witnesses came and said he was in New York City that week."

WILLIAM SHAKESPEARE, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am a Federal Prohibition Officer, and in October and [fol. 148] November, 1926, was stationed at Syracuse office. I met a lot of trucks in the month of October or November, 1926, on the road between Syracuse and Auburn. They were going by so often, that we decided to stop one, and I think it was on November 23rd, Agent Hazelton and I were on our way to Ithaca, and two trucks came along: one a big seven-ton Mack truck, and the other a green seven-ton Mack, and we stopped them on the east Camillus Hill.

Q. And what did you do when you stopped them?

Mr. Newton: I object to what they did when they stopped them on the ground that unless they identify the trucks, the evidence is incompetent and immaterial, and not binding on any respondent.

The Court: Overruled.

Mr. Newton: Exception.

A. After we stopped the trucks, we looked into the rear, and also driver produced a paper.

Mr. Newton: I object to the paper upon the ground that the paper is the best evidence, and it is hearsay and not binding on any respondent. I object to describing anything that was on the paper on the ground that the paper is the best evidence.

[fol. 149] The Court: Overruled.

Mr. Newton: Exception.

A. It was a carrying or transportation permit for alcohol. When I opened the back door of the truck, I demanded of the driver to see the carrying papers.

Mr. Newton: I object to what he demanded or said to the driver as hearsay and not binding on the respondents.

The Court: Overruled.

Mr. Newton: Exception.

A. I demanded to see his carrying papers, his transportation permit, he produced it.

Mr. Newton: I move to strike out that he produced a transportation permit, that the paper produced is the best evidence.

The Court: Motion denied.

Mr. Newton: Exception.

There were drums on this truck. I opened the back of the truck and I saw these drums in there, and there was writing on them.

Mr. Newton: I object to his stating what the writing was on the drums as incompetent, and not binding on any respondent.

The Court: Overruled.

Mr. Newton: Exception.

The Witness (continuing): "Waterloo Distilling Cor-
[fol. 150] poration. Alcohol S. D. 40".

I read the papers over first. I retained them in my possession, and I took them in to a telephone, and called up the office to see whether they were bona fide. I then gave the driver back the papers.

Q. What did you see on the paper when you read it?

Mr. Newton: Objected to on the ground that it is incompetent, and hearsay and improper.

The Court: Overruled.

Mr. Newton: Exception.

A. Fifty drums of S. D. 40 alcohol. The consignor was the Waterloo Distilling Corporation, Waterloo, N. Y., and the consignee was the Greendale Storage Warehouse, 400 Flushing Ave., Brooklyn, N. Y.

Cross-examination.

By Mr. Newton:

I testified before in April, in a lawsuit in this matter. I don't remember that I then exactly said, the Greendale Company, 400 Flushing Avenue, from the record I evidently did. I did not open any of the drums, and did not know any of these drivers personally. I did not know who they worked for, only what they told me. I believe I asked

[fol. 151] them for their names. I haven't got them now. I saw them on the driver's slips, on their motor vehicle operator's license, and all I know about whether they were the ones named, was the taking of their word for it. I did not take the numbers of the trucks.

Redirect examination.

By Mr. Templeton:

I mean when I called the office, the Syracuse Administrator's office.

JOHN F. WILLIAMS, a witness for the Libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I am a Government Chemist assigned to the Buffalo office. I recall making a test and examination of the Libellant's Exhibits 28, 29 and 30 for Identification.

Q. What did you find them to be?

Mr. Newton: I object to it on the ground that it is incompetent and not binding on the respondents, no proper foundation laid for the testimony.

The Court: Overruled.

Mr. Newton: Exception.

[fol. 152] A. Specially denatured alcohol No. 40, made from alcohol to which isopropyl and brucine had been added.

Mr. Templeton: I ask that these be marked in evidence.

Mr. Newton: Same objection.

The Court: Same ruling.

Mr. Newton: Exception.

(Libellant's Exhibits 48, 49, 50 and 51 for Identification marked Libellant's Exhibits 48, 49, 50 and 51 in Evidence.)

I have been a Chemist since 1920. Am a graduate chemist. Since 1921, I have been in the employ of the Govern-

ment. Exhibits 28, 29 and 30 came to my office by express. Specially denatured alcohol No. 40 is pure grain alcohol to which approximately a half of one per cent of isopropyl has been added. Isopropyl alcohol is a substance related to grain alcohol. It has a very slight odor. Brucine, which has a bitter taste, three ounces of brucine to one hundred gallons of alcohol.

Q. How much isopropyl alcohol would be added to a tank containing 5000 gallons of alcohol, mixed and denatured?

Mr. Newton: Objected to as incompetent and immaterial.

The Court: Received.

Mr. Newton: Exception.

A. Twenty-five gallons of isopropyl alcohol is added.

[fol. 153] Q. And how many pounds of brucine?

Mr. Newton: Same objection.

The Court: Same ruling.

Mr. Newton: Exception.

A. About ten pounds of brucine.

You cannot distinguish by color isopropyl alcohol from pure grain alcohol. Isopropyl alcohol has a slight odor and slight taste, which it is almost impossible to detect. Have to resort to a chemical test to detect it.

Q. With reference to the denaturants, is it easy or difficult to redistill specially denatured alcohol No. 40?

Mr. Newton: Objected to as incompetent and immaterial.

The Court: Received.

Mr. Newton: Exception.

A. Just as easy to distill No. 40 as it is to distill alcohol itself, because that is what it is, with these other things present in very small quantities.

Q. Now, redistilling specially denatured 40, do you have to redistill it more than once in order to remove the isopropyl and the brucine?

Mr. Newton: Same objection.

The Court: Received.

Mr. Newton: Exception.

A. By one distillation the brucine is eliminated; the [fol. 154] isopropyl alcohol is not.

With reference to completely denatured alcohol, to a one hundred gallons of grain alcohol, two gallons of a special grade of wood alcohol, crude wood alcohol which has a decided odor, was added; a half gallon of kerosene and a quarter of a gallon of pyrodin. All three of those denaturants have a decidedly disagreeable odor.

Q. If you were denaturing 5000 gallons at one time in a tank, how much wood alcohol would you be using?

Mr. Newton: Objected to as incompetent and immaterial.

The Court: Overruled.

Mr. Newton: Exception.

A. To five gallons of grain alcohol, permit C. D. No. 5, you would add one hundred gallons of crude wood alcohol, 25 gallons of kerosene, and 12½ gallons of pyrodin.

Q. Is it easy or difficult to redistill or remove the denaturants from C. D. No. 5.

Mr. Newton: Same objection.

The Court: Overruled.

Mr. Newton: Exception.

A. It is easy to distill it, but the denaturants are very difficult to take out. Pyrodin may be partly removed; kerosene and wood alcohol nearly impossible to remove by distillation.

[fol. 155] Cross-examination.

By Mr. Newton:

Wood alcohol used in C. D. 5, is poisonous. Brucine if taken in quantities is poisonous. Isopropyl alcohol is used in S. D. 40 to identify the source of the alcohol, so that if a sample of alcohol is examined and isopropyl alcohol found, that is an indication that it came from specially denatured alcohol. I wouldn't say that specially denatured alcohol is fit for beverage purposes. S. D. 40 is tax free and C. D. 5 is tax free. I do not recall of having examined any recovered C. D. No. 5 in October, November and December, 1926,

and January and February, 1927. Later I did. I believe it was after February, 1927. I am not certain. Government regulation, Article 88, defines denatured alcohol as follows: "Denatured alcohol is ethyl alcohol to which has been added such denaturant materials as render the alcohol unfit for use as an intoxicating beverage. It is free of tax and is solely for use in the arts and industries. Completely denatured alcohol is ethyl alcohol treated with various substances and according to a formula. It may be sold and used within certain limitations without permit and bond. Completely denatured alcohol is a poison. It cannot be used internally and is injurious if used externally. Specially denatured alcohol is ethyl alcohol so treated with denaturants as to permit of its use in a greater number of specialized arts and industries than completely denatured alcohol. The character of the denaturant or denaturants is [fol. 156] such that it may be sold, possessed and used only pursuant to a permit and bond except as otherwise provided."

Redirect examination.

By Mr. Templeton:

In my examination in October, November and December, 1926, and January and February, 1927, we found quite a number of samples of S. D. 40 turned in for examination that had isopropyl alcohol in it, which indicated a redistilling of S. D. 40.

Recross-examination.

By Mr. Newton:

To redistill specially denatured No. 40 alcohol you would have to have a still. A still would be necessary in cleaning C. D. 5.

Martha E. Meyer, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

In October, November and December, 1926, I was bookkeeper for the Waterloo Distillery, for which I started to

work December 1, 1924. I was working for them when Mr. [fol. 157] Bauer became President, the 1st of October, 1926. In October, November and December, 1926, Mr. Fingerhood was at the plant once the latter part of October, I couldn't say definitely just when it was. Mr. Fingerhood did not check over accounts with me in October, November and December, 1926. Mr. Becker in New York was the official accountant. He then had offices with Mr. Fingerhood in New York. In October, November and December, 1926, I submitted daily reports to Mr. Fingerhood in New York, of what had occurred in the plant. They contained information as to the amount on hand in the bank at the beginning of the day, the checks that were issued, and if any deposits were made, they would state from whom they were received, and they would state the amount of bushels, the mash, the yield, the amount of corn on hand, the amount of malt on hand, and the amount of rye on hand, and they stated the shipments of grain or alcohol and what kind of alcohol. I believe that is all. I made out the daily report, and kept one copy on file in our office and sent the duplicate to the Austin Bagley Corporation. I sometimes, not always, made the deposits in the bank. During the period of October, November and December, 1926, Mr. Bauer signed the checks for the company. Our Treasurer did not sign them then. On October 1st, 1926, or September 30, the bank balance in the First National Bank was $4236.50, and there was an even $200.00 October 1st in the G. E. Zartman & Company Bank. There were no other bank accounts. [fol. 158] The total deposits in October were $26,169.06, in November $31,383.90, and December $44,104.90, all in the First National Bank, and then September, $3,758.31, October, $4,690.11, November, $3,740.97, and December $5,387.44, in the Zartman Bank. The source of the moneys deposited in the First National Bank were: October 1, 1926, from Dewey Bros., Blanchester, Ohio, for grain sold to them, (dry grain, by-products of alcohol), $863.63; October 6, exchange item of $150.00; October 6, check from W. H. Long & Co., $5000.00, and another check for $2000.00; October 7, $1027.96 from Dewey Bros. Co.; October 11, from Long & Co., $2000.00, and same day, a check creidted to the account of Long & Co. by check of Cameron, Bailey & Hoe, of $5000.00. Mr. Baur was in charge at that time, and he probably told me, although this check was from Cameron,

Bailey & Hoe, to credit it to the account of Long & Co.; October 13, from Dewey Bros. Co. $49.68, October 16, from Dewey Bros. Co., $770.00; October 16, 1926, Long & Co., $3000.00; October 31, from Lehigh Valley Railroad Co., $141.10; October 23, check from Long & Co., $5000.00; October 29, check from Dewey Bros. Co. for $1,140.53; October 30, from Dewey Bros. Co., $29.16. In that amount approximately $20,000.00 was received from Long & Co. These checks came in the mail. Sometimes the mail had been opened and the check put on my desk.

The deposits for October, 1926, in the Zartman Bank were: October 2, First National Bank check, $724.59; and the same on October 8, for $869.77, and also check from [fol. 159] First National for $1119.77, October 23, check from same bank for $1012.91, and October 30, check from same bank $963.07.

The deposits in the First National Bank for November, 1926: November 1, from Dewey Bros. Co., $850.40; November 6, check from W. H. Long & Co., $2000.00; November 10, check from Dewey Bros. Co. for $1027.50; November 12, check from Standard Solvents & Chemical Corp. for $3500.00; November 12, check from Long & Co., for $3000.00; November 15, check from Amallin Ckrodt Chemical Works for $110.00; November 16, check from Long & Co., for $9000.00; November 20, check from Long & Co., for $10,000.00; November 22, exchange check, $96.00; November 29, check from W. H. Long & Co., for $2000.00.

In November, 1926, checks from First National to Zartman Bank, were deposited as follows: November 6, $914.74; November 13, $989.34; November 20, $947.44; November 27, $889.45.

There was deposited in the First National Bank for December, 1926, as follows: On the 1st, $2081.72 from Dewey Bros. Co.; the 4th, check from W. H. Long & Co., for $10,000.00; the 6th, check from Dewey Bros. Co. for $822.15; the 9th, from Dewey Bros. Co., $932.30, and on the same day, check from W. H. Long & Co., for $10,000.00; the 14th, check from Standard Solvents & Chemical Corporation for $8000.00; the 15th, check from Dewey Bros. Co. for $957.60; and from Lehigh Valley Railroad Co., $389.78; [fol. 160] the 20th, from Dewey Bros. Co., $1,031.61; the 22nd, check from the Standard Solvents & Chemical Corporation, for $3,289.18; and on the same date, from the

Standard Solvents $1000.00; the 27th, check from Dewey Bros. for $1089.15; the 28th, check from the Standard Solvents & Chemical Corporation, for $3596.41; the 29th, check from Dewey Bros. Co., $1015.00.

For December, 1926, checks from the First National to Zartman & Co., were deposited as follows: 4th, $1064.73; 11th, $1065.27; 18th, $1065.36; 24th, $1140.55; 31st, $1051.53.

On the books, September 30th, accounts receivable show the credit balance of $19,094.75. That does not mean that was due the Waterloo. When you sell anything you debit accounts receivable and credit it to sales. October 1, 1926, Waterloo owed Long & Co., $5500.00. I became Secretary and Treasurer of Long & Co., the second Saturday in August, 1927, and continued until May 19, 1928. In October, November and December, 1926, there was one shipment to Long & Co., and Mr. Baur got the order for that. It was 100 drums of pure alcohol, for which $1611.72 was charged, I believe, December 9th. If the figures I have given are added correctly, though Long & Co., did not buy anything but 100 drums between October 1st, 1926, and December 31st, 1926, Long & Co., during those months paid to Waterloo a total of $66,000.00. Nobody talked to me about that $66,000.00, or the money that was paid by Long & Co. to [fol. 161] Waterloo. Mr. Baur told me to put it in the books. The books do not show that notes were given to Long & Co. for the $66,000.00 advanced by it. I believe the entire sales were made to the Standard Solvents & Chemical Co. with the exception of 100 drums and the grain referred to. It is my recollection that the only source of income those three months was from the Standard Solvents, Long & Co., and the Grain Company. The total charge for cartage of alcohol to the Standard Solvents at Syracuse, for those three month, was $4402.00. The books show the Bijou Forwarders, Inc., did that work. There was no payment on this account within the three months.

I never had anything to do with the books of Long & Co. Baur, as President of the Waterloo Distillery, received $70.00 a week during October, November and December, 1926.

Q. What was the salary of O'Malley?

Mr. Newton: Objected to as incompetent and immaterial.
The Court: Overruled.
Mr. Newton: Exception.

A. $50.00 a week.

My salary was $35.00 a week. Mr. Fingerhood received no salary that I know of. Labate did not receive any salary to my knowledge. We had a cost system in the plant. I cannot tell from our books whether there were any earnings for the Waterloo Company for October, November and December, 1926, because I never prepared any [fol. 162] profit or loss statements. The accountant in New York, Mr. J. L. Becker, prepared that.

J. Vincent Labate, a witness for the libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I live in Brooklyn. I was interested in the old Waterloo. I was one of the men who sold it to the Austin Bagley. I am Secretary and Treasurer of the Waterloo Distilling Corporation, and have been since 1925, I think, and I was in October, November and December, 1926. Government's Exhibit 20 which purports to be a deed from the Waterloo to the Seneca Solvents & Chemical Corp., signed by J. Vincent Labate, Secretary and Treasurer, of the Waterloo Distilling Corporation, dated May 19th, 1928, was signed by me on that day, in New York City. I am one of the Board of Directors of the Waterloo, and Mr. Fingerhood is the only other Director. In October, November and December, 1926, I think Mr. Fingerhood was a Director, and during those three months Mr. Baur was President.

Q. And while Mr. Baur was President, was Mr. Fingerhood on the Board of Directors?

A. I think so?

Mr. Newton: I move to strike out what he thinks.

[fol. 163] The Court: The answer may stand.

Mr. Newton: Exception.

Q. Were you at Waterloo at any time during those three months?

A. No, sir.

Mr. Newton: I object to that, and move to strike it out, as incompetent and immaterial.

The Court: Overruled.

Mr. Newton: Exception.

Q. Did you attend the Board of Directors meeting at Waterloo in any of those three months?

Mr. Newton: I object to it on the ground that it is incompetent and immaterial.

The Court: Overruled.

Mr. Newton: Exception.

A. No, sir.

I was Secretary and Treasurer during those three months. I was a Director of Waterloo when they bought Long & Company. I did not know anything about the finances of the company during those three months, as Secretary and Treasurer. During those three months, I never conferred with anybody about the management of the Waterloo Distillery, except occasionally with Mr. Fingerhood. I am not sure that I saw him during those three months. I never saw any of the daily reports that went to Fingerhood. I was a stockholder of the Austin Bagley [fol. 164] Corporation. I never saw a financial statement of the Waterloo, of Long & Co., or of Austin Bagley for October, November and December, 1926. I am not an officer of Austin Bagley or Long & Co. I don't know who the officers of Long & Co. are.

Q. Did you ever have a meeting during October, November or December, 1926, discussing W. H. Long & Co.?

Mr. Newton: I object to that as incompetent and immaterial.

The Court: Overruled.

Mr. Newton: Exception.

A. No, sir.

Q. Do you know that Waterloo Distilling Corporation owned all the stock of W. H. Long & Co. in October, November and December, 1926?

Mr. Newton: I object to that as incompetent and immaterial.

The Court: Overruled.

Mr. Newton: Exception.

A. I knew that they owned the stock when they bought Long & Co.

I was on the Board of Directors when Waterloo bought Long & Co., and that was before October 1st, 1926. I signed checks for Waterloo until June or May, 1925, the time Austin Bagley took over the plant, and after that I never signed a check.

Q. Is your signature at any of the banks, or was it, so that you could sign a check for Waterloo during October, [fol. 165] November and December, 1926?

Mr. Newton: Objected to as incompetent and immaterial.

The Court: Overruled.

Mr. Newton: Exception.

A. No, sir.

Q. Who was running the Waterloo Distillery in October, November and December, 1926, whom did you, as Director, authorize to run it?

Mr. Newton: I object to that as incompetent and immaterial.

The Court: Overruled.

Mr. Newton: Exception.

A. I think Mr. Baur was in charge of the distillery.

Q. As a Director did you attend a meeting when Baur was made manager?

Mr. Newton: I object to that as incompetent and immaterial. No outside person can attack anything as to who acted for the Corporation, except the stockholder. It is binding on every outside party, except the stockholders.

The Court: Objection overruled.

Mr. Newton: Exception.

Q. Who told you if anybody that Baur was running the Waterloo in October, November and December, 1926?

[fol. 166] Mr. Newton: I object to that as incompetent and hearsay.

The Court: Overruled.

Mr. Newton: Exception.

A. Mr. Fingerhood.

He told me that in his office in New York City.

Q. What did he say at that time?

Mr. Newton: I object to that as incompetent and immaterial.

The Court: Overruled.

Mr. Newton: Exception.

A. He said that Mr. Rodenberg had resigned and Mr. Baur was running the plant.

He told me that Baur had been elected President.

Q. Who were the Directors October 1, 1926?

Mr. Newton: I object to that as incompetent and immaterial.

The Court: Overruled.

Mr. Newton: Exception.

A. Mr. Fingerhood and myself.

I think Mr. Fingerhood was a director October 1st, 1926.

Q. Did you attend a meeting at about that time with Fingerhood and elect Mr. Bauer President?

Mr. Newton: I object to that as incompetent. It cannot be attacked by any person but a stockholder. It is a New York corporation.

[fol. 167] The Court: Overruled.

Mr. Newton: Exception.

A. No, I didn't.

Government's Exhibit 8 is signed by me in my handwriting. I gave it to Mr. Fingerhood. I think for the Government, I don't know. So the Government might have a proper officer certified by our distillery.

Q. Did you attend any meeting of the Board of Directors to elect Baur President, as certified there (Exhibit 8)?

A. No, sir.

Mr. Newton: I move to strike out the answer as incompetent and not material; that the resolution held out by the Corporation was binding on this corporation, and could only be attacked by a stockholder of the Corporation.

The Court: Denied.

Mr. Newton: Exception.

Mr. Fingerhood sent Exhibit 8 to me and I signed it, and sent it back to him by mail, or messenger. (Two pages of Minute book of Waterloo Distilling Corporation, dated October 4th, 1926, marked Libellant's Exhibit 83 for Iden-

tification.) Looking at the last three pages of the book, that is my signature on the second page(the third page of the minute book is marked Libellant's Exhibit 84, for Identification). I signed those, as the minutes of the Board of Directors, of the Waterloo Distilling Corporation.

[fol. 168] (Libellant's Exhibit No. 83, for Identification marked Exhibit No. 83 in Evidence.)

(Letter from L. R. Rodenberg to J. Vincent Labate, Secretary, Waterloo Distilling Corporation, dated October 4, 1926 marked Exhibit 85 for Identification, envelope marked Exhibit 85-a for Identification.)

I received Exhibits 85 and 85-A for Identification, by mail, October 4th or 5th, 1926, from Mr. Rodenberg, the President of the Waterloo.

(Exhibits 85 and 85-A for Identification marked Libellant's Exhibits 85 and 85-A in Evidence, and read to the jury, and also Exhibit 83 by Mr. Templeton.)

Q. Mr. Labate, did you attend a meeting of the Board of Directors of the Waterloo Distilling Corporation in New York City on the 4th of October, 1926, at 2 P. M.?

Mr. Newton: I object on the ground that it is immaterial whether he did or not. The resolution is binding on every person, every concern, except the immediate stockholders of the Corporation.

The Court: Overruled.

Mr. Newton: Exception.

A. I did not.

Q. Did you attend any meeting on the 4th in which [fol. 169] Rodenberg was present?

Mr. Newton: Same objection.

The Court: Overruled.

Mr. Newton: Exception.

A. No, sir.

I signed Exhibit No. 83.

Q. Who presented these minutes to you?

Mr. Newton: Objected to as immaterial and incompetent. It is binding on the Government and everybody outside the corporation.

The Court: Overruled.
Mr. Newton: Exception.

A. Mr. Fingerhood.
Q. When did he give them to you?

Mr. Newton: Same objection.
The Court: Overruled.
Mr. Newton: Exception.

A. Well, in October, 1926, to sign.
Q. Sometime after the date of this supposed meeting?
A. Yes.

Mr. Rodenberg and myself were the only two directors of the Corporation, October 4th, 1926. I received the resignation Rodenberg sent October 6th, in the New York office. I did not see him at that time, and he never appeared with me at any meeting. That is my signature on Exhibit 7. I gave to the Government a certified copy of a resolution [fol. 170] taken from these minutes, certifying that Rodenberg had resigned, and that Baur was elected President of the Waterloo Distilling Corporation, so that from that day on Baur could sign all reports required by our corporation to be given to the Government. Mr. Fingerhood asked me to sign that. I don't remember if I sent that personally to the Administrator at Buffalo. All I did was sign it. I was in October, November and December, 1926, Vice-president of the Atlantic State Bank, and a director and stockholder in it. I did not attend any meeting of the Board of Directors of the Waterloo Distilling Corporation in October, November or December, 1926, at which Mr. Rodenberg appeared.

Q. Was there any time that Rodenberg's resignation was accepted?

Mr. Newton: Objected to as immaterial and on the grounds I have stated in the other objections, and calls for a conclusion.
The Court: He may answer.
Mr. Newton: Exception.

A. No, sir.

When I left the place Waterloo had bought Long & Co., and owned it in November, October and December, 1926.

Q. You, as Secretary and Treasurer of this Company, have you ever seen the books of Long & Co.?

Mr. Newton: Objected to as incompetent and immaterial.
[fol. 171] The Court: Overruled.
Mr. Newton: Exception.

A. No, sir.

Q. Did anyone ever go over these daily reports furnished by the bookkeeper in Waterloo to Fingerhood in New York, without your seeing them?

Mr. Newton: Objected to as incompetent and immaterial.
The Court: Overruled.
Mr. Newton: Exception.

A. No, sir.

Cross-examination.

By Mr. Newton:

Mr. Newton: I offer in evidence, or ask to be deemed marked in evidence, the case of Zeltner vs. Henry Zeltner Brewing Company, 174 New York 247, contending that it holds that, as a general rule, corporate officers may resign at will, and the validity and effectiveness of such resignations does not depend upon their formal acceptance.

Mr. Templeton: If the Court please, I object to having a case of that kind read in evidence.

Mr. Newton: The evidence shows it is a domestic cor-
[fol. 172] poration, and unless I do put the law in from the State where the corporation is incorporated, the law of the United States govern; as to the United States Government, every state and its statutes and decisions are foreign to the Government, and must be proved, to be considered in evidence. It is a question of fact for the jury, what the law is.

The Court: Objection sustained.

Mr. Newton: Exception. I offer in evidence the case of Craig Medicine Company vs. Merchants Bank, 59 Hun. 561, that it be deemed marked in evidence, upon the proposition that this being a Domestic Corporation, Corporations can act only through their officers and agents; and if a person has been intrusted by the officers to carry on the business,

the acts of that person must be deemed to be binding upon the corporation in all cases where the parties dealing with him have not notice or knowledge of his want of actual authority.

Mr. Templeton: The same objection to that.

The Court: Sustained.

Mr. Newton: Exception. I offer in evidence the case of Lyon vs. West Side Transfer Company, 132 A. D. 177, that it be deemed marked in evidence, upon the proposition that acts done by executive officers of a corporation within the apparent scope of their authority, in regard to the regular [fol. 173] business of the corporation, and binding upon it, and the persons dealing with such officers under such circumstances is not required to prove specific authority from the Board of Directors, and is not affected by any secret provisions of the By laws not brought to his attention. That is the case of Lyon vs. West Side Transfer Company, 132 A. D. 177.

Mr. Templeton: I have the same objection, and the further objection that the question is not as to whether Mr. Baur acted as president or not. The question is whether he was ever elected president of this corporation, or a director of it.

The Court: Objection sustained.

Mr. Newton: Exception. Under those cases, I move to strike out all the evidence given by the witness pertaining to the By-laws or certified resolutions received in evidence.

The Court: Motion denied.

Mr. Newton: Exception.

The Waterloo Distilling Corporation was taken over by Austin Bagley Corporation in May, 1925, at which time I was, and had been for some time prior thereto, managing the actual operation of the distillery. At that time the Waterloo Corporation owed upwards of One hundred thousand dollars. It was in poor condition. We had very little money. It is possible that in May, and before that, 1925, [fol. 174] we did not have enough money for our payroll, of our employees. I know Mr. Ferneau, the inspector of Dewey Bros., of Blanchester, Ohio. They bought the dry grain, the by-products of alcohol, right along close to May, 1925. To keep the Waterloo going, I sold their property,

and when Mr. Ferneau, their inspector, came there to look at it, I pretended I could not find the keys to show him where the grain was stored, and I then went to Mr. Fingerhood in New York and told him how important it was to take care of our payrolls, and to take care of this property that I had sold without authority. I did this to keep the place going. Then in May, 1925, they took over the Waterloo Distilling Corporation, and assumed all the indebtedness of the Waterloo, which they assumed so that I would not be in trouble in the payment to Dewey & Co., or the delivery to them of grain to take the place of the grain that I took and sold. Since May, 1925, the Waterloo owned all the stock of Long & Co. My friends and I are bond holders of the Waterloo. I never ask anybody to see any daily reports or anything of the Waterloo Distilling Corporation, or the minutes of Long & Co. Nobody in the Waterloo ever complained about any resolution that was adopted, or anything that I did as a Director. I read all the minutes and knew what I was signing. As a director, I knew and intended that those minutes should be binding on the corporation, and nobody ever questioned a single act of our Board of Directors, until here.

[fol. 175] Redirect examination.

By Mr. Templeton:

(Bond of Austin Bagley Corporation, dated June 15, 1925, signed R. C. Harper, President, C. H. Fingerhood, marked Libellant's Exhibit 86 in Evidence, and read to the jury.)

Q. That R. C. Harper, President, is the man who later became Administrator for the Government for New York State?

Mr. Newton: Objected to as incompetent and immaterial.
The Court: Overruled.
Mr. Newton: Exception.

A. He is the same man who was Administrator. I knew him personally.

I had $22,000 worth of these bonds, and $143,000 were issued.

Q. Was there any mortgage given on the plant to secure them?

Mr. Newton: Objected to as immaterial.
The Court: Overruled.
Mr. Newton: Exception.

A. I think the bonds are a mortgage on the property.

Mr. Templeton: Libellant rests.

MOTION TO DISMISS

Mr. Newton: Respondents move to dismiss the libel on all the grounds stated in the motion at the beginning, before [fol. 176] the starting of the case.

The Court: Motion denied.

Mr. Newton: Exception. Respondents move to dismiss the libel as to all real property outside the bonded premises, except the part outside such bonded premises, if any, as was used by the Waterloo Distilling Corporation for purposes of ingress and egress to the bonded premises.

Mr. Newton: The section I draw your attention to is Section 3281, the ingress and egress part is at the very end, and the other part about the premises I called attention to is at follows:

(Reads.)

The Court: Have you any cases on that, Mr. Templeton?

Mr. Templeton: It is my understanding that it includes the entire premises owned by the corporation in connection with this distilling.

Mr. Newton: What did they bond it for, then, why did they call it bonded premises?

The Court: I will deny the motion.

Mr. Newton: Exception. I move to dismiss the libel as to pure grain alcohol, upon the ground the Government has failed to prove facts sufficient as a foundation for intent to defraud the Government of any tax by reason of its use, it [fol. 177] being intact and never used and relates to something in the future, and continually in the control and possession of the United States.

The Court: Motion denied.

Mr. Newton: Exception. I move to dismiss the libel upon the ground that the sections cited in the libel as the basis for the proceeding, in so far as they lay a tax upon alcohol for beverage purposes, is unconstitutional and against the provisions of the Eighteenth Amendment of the Federal Constitution.

The Court: Motion denied.

Mr. Newton: Exception. I move for a dismissal of the libel as to all the property therein named, on the ground that the Government has failed to prove facts sufficient to constitute the cause of action alleged in the libel.

The Court: Motion denied.

Mr. Newton: Exception. I move to dismiss the libel upon the ground that all the sections cited in the libel as the basis therefor refer to distilled spirits, and that denatured alcohol is not a distilled spirit.

The Court: Motion denied.

Mr. Newton: Exception.

[fol. 178] Albert J. Jackson, a witness for respondents, testified as follows:

Direct examination.

By Mr. Newton:

I am 44 years old, and reside in Auburn, N. Y. I am not doing anything at the present time, but my occupation has been farming mostly. I am married. On May 18, 1925, I started to work in the Internal Revenue Department of the Government, under Collector Jesse Clark, Syracuse, and did the work of store keeper gauger, under assignment of warehouse agent at Waterloo Distillery. My duties there were to supervise the manufacture of alcohol, from 12 o'clock mid-night, until 8 o'clock in the morning. I used to take the temperature and gravities of the tubs, so that they were filled, open the tail boxes when they wanted to take samples, to test for proof, purity of alcohol; open the different valves to blow down kettles. The valves were all locked and during the hours I was on I had the keys to the distillery, and every lock in the distillery, as Government agent. Mr. Tanner, or Mr. Takel, the other agents, whichever came

first in the morning, relieved me, and I then handed the keys to the one who came first. I continued to work as warehouse agent at the Waterloo until October 11th, 1926, when I was made a gauger. Mr. Tanner's duties there were store-keeper gauger in charge. When I was on duty, no one else had any of the keys to these locks in the distillery. I had the keys to the denaturing plant throughout October [fol. 179] 11, to the 16th, 1926, and no denaturing could be done there during that time without my taking part in it and using the key to open up the denaturing plant. After October 11th, to the 16th, 1926, denaturing of C. D. 5 alcohol, was done. That is the only kind of alcohol that was ever denatured there in my time. Along in May or June, 1926, I asked the Collector at Syracuse for a transfer from night work to day work, and when they gave it to me I had changed my mind, and did not really want it then, but I accepted it because of the party I spoke to about getting the change. He was Secretary to our Congressman. In October, November and December, 1926, and January and February, 1927, I had only seen Charles H. Fingerhood once, but that was before that time, and I did not know who he was. I never spoke to him before those dates. I never saw Baur until the morning of October 11th, and had no private conversation with him, only just about the work generally, during the months of October, November and December, 1926 and January and February, 1927. The company made the report of the activities at the plant, but during the time I was on duty, I superintended the denaturing of the alcohol. I put a storekeeper's gauger stamp on reports No. 1456 and 1457, to show what time we received the report, which showed the quantity of alcohol received, manufactured and shipped. After the distillery corporation made the report, they gave it to me, I looked it over, checked it over to see if it was right with my figures, and then the [fol. 180] stamp was put on. A copy was sent to the Collector at Syracuse, one to the Prohibition Administrator at Buffalo, and one to the Commissioner at Washington, and a fourth one I handed back to Miss Meyer. I found the reports that I stamped always correct, during October, November and December, 1926. In October, November and December, 1926, I think Probibition Agents Murphy, Maloney, Willard, Hartwell, Dupont, McBachron and McQuaid were there, supervising in a way everything that was

going on all over the plant and watching things in all parts of the plant. Prohibition Agent William Hartwell, I think came there about the 15th or 16th of October. He was at the denaturing plant most of the time. He was at the warehouse and the distillery also. I never had anything to do with the monthly reports, the storekeeper gauger in charge, Mr. Tanner, always took care of that. He checked it up, stamped it, and sent it in. In October, November and December, 1926, none of the seals on the locks were broken. I had to do with making a monthly report to the Collector of Internal Revenue, being an inventory of the Government's property that consisted of the locks and the seals used and seals on hand, and the Government property. I saw nothing that was improper in the denaturing of the alcohol, or shipping it out of the plant, while I was there. I was actually present when the denaturing took place, and superintended it, and saw that it was done according to the regulations of the Department in each instance.

[fol. 181] Cross-examination.

By Mr. Templeton:

I was connected with both the Internal Revenue Department and the Prohibition Department, and appointed by the Collector of Internal Revenue at Syracuse, to whom I made this monthly report, as to the locks and keys in my possession. I don't know the Prohibition Officer assigned to me during October, November and December, 1926, at the denaturing plant. Chamberlain was at the plant most of the time. When I named the agents I did not intend to omit Chamberlain's name. I omitted Mr. McQuaid's name, until my attention was called to it. Mr. Chamberlain was with me nearly every time there was any denaturing done in the plant. During the time Mr. Hartwell was there, Chamberlain wasn't there at all. Hartwell was there close to a week. With the exception of the days Hartwell was there, Hoyt Chamberlain was there every day, I think. I knew he worked with me in the plant. I know that these other Prohibition Agents only drifted in there occasionally. I saw big Mack trucks around there, and every time anything was drawn away from the denaturing plant those Macks

took it, during those three months. I haven't seen Mr. Chamberlain around here. I have only been in court today.

[fol. 182] Redirect examination.

By Mr. Newton:

Every time these Mack trucks went away, they had on completely denatured alcohol, and none of the trucks had a radiator on the front of it.

Benny Lamberte, a witness for respondents, testified as follows:

Direct examination.

By Mr. Newton:

I am forty-three years old, and have lived at Seneca Falls, N. Y., for eighteen years. Seneca Falls is not quite seven thousand. There is no other Benny Lamberte there, nor was there in October, November and December, 1926, or any other time. In October, 1926, I did not know Charles H. Fingerhood. In October, 1926, I was not at Seneca Falls with Charles H. Fingerhood. I don't know Mr. Felter, the station agent at Seneca Falls, and did not know him in October, 1926. There are two stations at Seneca Falls, the New York Central and Lehigh, and in October, November and December, 1926, I never was at either of these stations with anyone.

[fol. 183] Cross-examination.

By Mr. Templeton:

My business is, and was in October, 1926, a cigar store. I have never been convicted of any crime.

Charles F. Moses, a witness for respondents, testified as follows:

Direct examination.

By Mr. Newton:

I am forty-four years old and reside at Seneca Falls, N. Y., and have been around there practically all my life.

I am a truck driver. I knew Mr. Felter, the station agent there. In October, 1926, he was agent for the Lehigh Valley Railroad Company. I remember an occasion in October, 1926, when some drums were seized in a car at Seneca Falls. I saw drums passed from the truck on the car before the seizure. The truck was a two and one-half ton truck. It was not a Mack truck. I am acquainted with Mack trucks. I have known of them pretty well since 1908, and have driven them. In October, November and December, 1926 the two ton Mack trucks had the standard radiator in front; the five ton trucks which we term as the Bull-dog, had the radiator back of the engine, and not in front at all.

[fol. 184] JAMES O'MALLEY, a witness for respondents, testified as follows:

Direct examination.

By Mr. Newton:

I am forty years old and have lived at Waterloo thirty years. I work in a machine shop at Seneca Falls. I worked for the Waterloo Distilling Corporation, about three or four years. In October, November and December, 1926, I was general repairman there. I was in the denaturing plant of the Waterloo Distilling Corporation, a few days in October, 1926, four days, helping in the denaturing plant, assisting in getting drums in shape, and anything I could. I saw them denaturing alcohol there. I saw them put in wood alcohol and different stuff. I saw kerosene put in, and it seems to me benzine. These four days were pretty near from the 11th to the 14th of October. I remember a time in the fall of 1926 when the pump that pumped the alcohol was broken, and I aided in fixing it. It was along at that time. During the time the pump was broken, they did the denaturing on the floor. I worked in the denaturing room there those four days. I injured myself lifting drums and had to go to the hospital, where I remained about a month.

Cross-examination.

By Mr. Templeton:

I would fix it four days that I worked there in the de-
[fol. 185] naturing plant. I did not work on the pump, all

the while. My brother worked on it most of the time. I just helped him at times. My salary was $40.00. During the four days, I was in the denaturing plant most all of the time. Those days were the fore part of the week. I did not help my brother take out the pump. I helped him a little bit when he was repairing it, over in the machine shop, several hundred feet distant from the denaturing plant. I believe the pump was put back Wednesday or Thursday. It was put back within the four days. I happened to be in the denaturing plant because they were short of help. My brother ordered me to go to the denaturing plant. I only helped my brother a couple of hours or so on that pump. I don't remember how many drums were denatured the first day, but there was up to twenty anyway. I don't remember if there was more than twenty the first day. I assisted by getting the drums ready to put the denaturants in, took out the plugs and bungs. I didn't put any denaturant in any of the drums. I don't remember how many hours it took to do the twenty drums. They would lay the drum down flat, take the bung out, then pour the denaturants into the drum. I would think it took us a half a day to fill the twenty drums the first day. I can't remember what time it was. I finished at four o'clock in the afternoon. The drums had to be weighed. I suppose fifty drums were denatured the second day. It might have been fifty, it might have been more, I don't know. I thought twenty the first day. All I am doing is guessing at it. I [fol. 186] am not sure how many I handled the first day, or the second day, because I never counted them. I loaded them on the trucks that day. On the first day I loaded them on in the afternoon, after dinner, earlier than four o'clock, and before three o'clock, I would say. I don't remember if it was before two o'clock. The second day we started the same time, eight o'clock, and finished the same as the day before, around the same time. I don't know what time, about two o'clock. On the third day I don't know how long, but I should think probably the same, and about the same number of drums. I do not recall on the fourth day how many drums, or what time I finished denaturing. I never counted them and I couldn't answer for certain. I don't know anything about denaturing. I believe the denaturing was all the same on the first, second,

third and fourth days. I am sure that alcohol and kerosene went in all of them the same, I could smell the wood alcohol.

Redirect examination.

By Mr. Newton:

I kept no record at the time. While it was going on Mr. Jackson and Mr. Chamberlain, Government agents, were there.

[fol. 187] ALEXANDER GOLDMAN, a witness for the respondents, testified as follows:

Direct examination.

By Mr. Landes:

I live in the Bronx, New York and have been a practicing physician there twenty-three years; I am chief physician at the Bronx Hospital, which I built, and of which I was President for ten years; the General City Hospital, Bronx, and the Concourse Sanitarium. I have known Charles Fingerhood at least ten years. I delivered all three children of Mrs. Fingerhood, the last child October 2nd, 1926. She is home now sick in bed; she has been ill for the last six months, but she has been in bed the last couple of months. When I delivered the last child, October 2nd, 1926, Mrs. Fingerhood was in the Concourse Sanitarium ten days; I saw her on September 30th and brought her to the hospital. The child was born in early morning October 2nd, 1926. I saw Charles H. Fingerhood at the Sanitarium after the baby was born, on October 2nd. I don't remember how many times I have seen him as I came in there. I continued to attend to Mrs. Fingerhood in the Sanitarium for the ten days she was there and then I saw the baby next day at their home. Between October 2nd and the 12th, I saw Mrs. Fingerhood several times at the Sanitarium. I can not remember the exact days but I do remember certain days, the day after the baby was born I saw him that day. I saw him several times during the week, but the [fol. 188] day I remember, is the day of the circumcision,

October 10th, and he asked me to be present and I told him I did not make it a practice of being present, and then I saw him the day she left the Hospital when he paid me, October 12th in the office of the Hospital, and on October 13th, I saw Mr. Fingerhood and Mrs. Fingerhood at their home.

VIOLET ROSENBLUM, a witness for the respondents, testified as follows:

Direct examination.

By Mr. Landes:

I live at 311 East 176th Street, Bronx. I am registrar of the Concourse Sanitarium, and occupied that position in October, 1926. I am acquainted with Charles H. Fingerhood. I have known him approximately two years. The first time I met him was about three months before Mrs. Fingerhood was delivered at the Sanitarium, when he was there at the Doctor's office, making arrangements for the room. The baby was born to Mrs. Fingerhood on October 2nd, 1926. She was delivered about five o'clock in the morning. I came on duty at nine o'clock. I know I saw Mr. Fingerhood on October 2nd, some time during the day at the Sanitarium. I saw him more than once on that day, he was in the Sanitarium the greater part of the day. I saw him subsequent to October 2nd. He came in almost every day. I imagine he was there every day but I may [fol. 189] not have seen him every day. I remember a distinct recollection of seeing him frequently for some days after that and up to the time Mrs. Fingerhood went home on October 12th. Between October 2nd and 12th, Mr. Fingerhood, to the best of my recollection, was there several times a day, I believe. I saw him every day with the exception of one or two I may have been off. He paid his bill $200.00 on Saturday the 9th, and then he owed a balance of $29.00 which he paid October 12th, the day Mrs. Fingerhood went home. Dr. Goldman was present in the office at the time and I made the entries on the books of the

Hospital and I have them here. That is the chart I kept in the office, it is a record of the charges and credits against Mrs. Fingerhood's account while she was there. The payment was made on the 12th and I have credited her on the 12th. All the charges and credits are in my handwriting, and contained an entry of every charge made and all payments made and received. Mrs. Fingerhood was actually in the hospital eleven and a half days and I credited her one-half day since I had charged her for twelve days. The entry, $29.50, October 12th, was what he paid me as the balance of the bill. I have the nurses' charts here showing the day Mrs. Fingerhood was delivered, the day she went home and the history of the case all the time she was in the hospital and the baby chart here also. The — and gives the weight of the baby and general care for each [fol. 190] day is marked until the 12th, the day she went home. The next paper is the hospital chart, that is all the history of Mrs. Fingerhood from the 1st day, October 2nd, until the 12th of October. She came to the hospital the night of September 30th.

Albert D. Osborn, a witness for the Respondents, testified as follows:

Direct examination.

By Mr. Newton:

I live in Montclair, New Jersey. I am an examiner of disputed handwriting, typewriting, ink, etc., and have been so actively engaged for the last ten years, giving all my time to it. I have made a life study of handwriting, leading authorities thereon, examining handwriting problems and doing all I could to qualify myself for the work. I have testified in various courts in regard to handwriting, photographs, suspected signatures, typewriting, etc., and have appeared as an expert witness frequently for the United States Government. I have examined the disputed signatures and writings in this case. I have spent a good deal of time on the papers.

(Four photostats marked Exhibits A, B, C, and D respectively, for Identification.)

I have spent a good deal of time on the papers marked Exhibits A, B, C and D for Identification, (which are photo- [fol. 191] graphs of Government's Exhibits 47, 45, 46 and 44, which are the shipping bills I mentioned marked for identification as Government's Exhibits.) The other shipping orders which I examined last summer and have photographs of them for the last three months. I have compared the handwriting at the lower right hand corner and the lower left hand corner, of each of the Government's Exhibits 47, 45, 46 and 44. In my judgment, Charles H. Fingerhood did not sign the names in the lower left hand corner of those Government's Exhibits. My judgment is that Fingerhood did not sign these four exhibits, because there are many distinct differences in the handwriting as it appears on the shipping orders as compared with the handwriting of Mr. Fingerhood. I say Fingerhood did not do any of the writing in the left hand corner of these four shipping orders. There are two names on each shipping order, Government's Exhibits 45, "C. J. Wilson" and "Joe Welch", and on Government's Exhibit 44, "A. J. Webster" and "Chas. Dunn" and on Government's Exhibit 47, "Cooney Fette"—I do not believe that Fingerhood signed the names either in the right or left hand corners of those exhibits. The name "Felter" is at the lower right hand corner of those Exhibits. I think the man who wrote "John Miller" on the shipping orders on which the name appears is the same man who signed the orders on Exhibits 46, 44 and 52. I have compared the signature of "John Mueller" on Exhibit 53 with the signature "John [fol. 192] Miller" on Exhibit 27, and photographed it with other writings of Mr. Baur, and I think the indications are that he didn't sign it, even though in many parts it is alike. Comparing "John Mueller" and signed by Mr. Baur with the Exhibit 27 and with my attention called to the fact that Mr. Baur when he was signing the name in the presence of the Court, I will say that the indications are that he did not write it. He was not told how the name "Muller" spelled. Mr. Baur I assume is German and writes the

name and spells the name "Mueller" and that is the way he wrote it as he was asked to. The name on Exhibit 27 is written "Muller". Therefore he would have to remember, if he signed Exhibit 27, that he misspelled that name a year and half before, and I cannot imagine anybody having a memory as good as that. Comparing the two writings, Exhibit 27 and Exhibit 53, I will say that the word "John" is very similar. The o's are similar. The one on Exhibit 27 you would read it as an "m". The writing "John Mueller" on Exhibit 27 is similar to the writing on Exhibit 53 in many ways, but there are two distinct differences which make me feel that it is not the same writer. Comparing these two Exhibits 27 and 53, there is no question but the capital "M" as made by Mr. Baur is distinctly different than the capital "M" on Exhibit 27. In my judgment, it tends to show quite fairly that he didn't write the name "John Miller". I think the slant of the two "l's" there is a difference which should be noted between Ex-
[fol. 193] hibit 27 and Exhibit 53. I have compared the signature on the lower left hand corner of Exhibit 52 with the names "John Miller" before me, and the writings of Mr. Baur and I say that the writing at the lower left hand corner of Exhibit 52 and the words "John Muller" in Exhibit 27 look very much the same, but I cannot say the same person wrote the same.

I think probably that the man who wrote the name on the first line wrote the same name on the second line. I think that the signatures in the lower left hand corner of Exhibits 46 and 44, being shipping bills dated October 12th, and 13th, respectively, from Seneca Falls, and Exhibit 52, were all written by the same person.

Cross-examination.

By Mr. Templeton:

Mr. Fingerhood retained me in this case. Ordinarily a person attempting to disguise their handwriting usually writes backhand. Another disguise is a violent difference in the slant. Just receiving Exhibit 25, that is the lease, for examination, I would say on this such examination, that probably a different hand wrote the signature on 25 than

the one writing the signature on Exhibit blank—which consisted of the admitted signatures of Mr. Baur, signatures admitted by the respondents here to be Mr. Baur's. Examining the handwriting at the lower right hand corner of Exhibit 26, that is the Standard Solvents on the telephone lease, and eliminating the signature underneath, that is, [fol. 194] this part below here, and the signature on admitted signature of Baur. I can not say that they were written by the same hand, as there is very little for comparison. From what there is, I can not connect them. If Baur, whose signatures I have examined and whose handwriting I have examined, admitted writing "R. Beck" on Exhibit 26, and "R. Beck, President" on Exhibit 25, the lease, if he wrote it, he did not write it in his natural hand.

Ludwig Baur, called as a witness on behalf of respondents, testified as follows:

Direct examination.

By Mr. Newton:

I was born in Germany and will be thirty on my next birthday. I was christened in the name of Ludwig Baur von Breitenfeld. That's the name my father goes by. When I first entered business, I just used the name Ludwig Baur, by which name I was known by the people where I was working and have been known as Ludwig Baur for 12 years. My father had been employed as chemist for the Waterloo Distillery since the latter part of 1925, when Lester R. Rodenberg was President of the Waterloo Company. My father called me on the 'phone at New York from Waterloo about the middle of September, 1926, about going up there. About that time Rodenberg decided to retire as President and to go to his home at Lawrenceburg, Indiana. [fol. 195] I did not talk with Mr. Fingerhood about going there before my father suggested it. I spoke to Mr. Fingerhood the latter part of September, 1926, and in pursuance of that conversation I went to Waterloo the early part of October. I told Mr. Fingerhood the latter part of September, 1926, that I thought we could dispose of a lot of com-

pletely denatured alcohol in the vicinity of Waterloo. He asked me what my policy was and to whom I was going to sell, and informed me that Mr. Rodenberg had some trouble with a concern that he had sold completely denatured alcohol to in Utica, by the name of The Economy Paint & Glass Company, and they refused to allow the Government to inspect their books showing from whom and to whom they received and sold their merchandise. I told him I had spoken to Joe Beck about taking quite some merchandise from W. H. Long & Company and informed Mr. Fingerhood that Mr. Beck would be willing to show the Government any record of alcohol received and sold. I knew Beck for about ten years. We sold his concern in New York quite a lot of completely denatured alcohol. This concern was the principal concern we sold. I told Joe Beck I was thinking of going up to Waterloo and he said he would like to have a chance to go in business in that vicinity and understood there was quite a market for completely denatured alcohol. In the summer of 1926, the market in New York City for completely denatured alcohol was flooded and the price of C. D. was very low, being shipped in from all parts of the world, you [fol. 196] might say, Porto Rico, New Orleans and out West. After my talk with Joe Beck, I talked with Fingerhood before I went to Waterloo. I got there in the early part of October, 1926, and moved with my wife and family there on November 3, 1926. My father was there in the capacity of chemist. Mr. R. Beck was present when I talked to his brother, Joe Beck. Before I went to Waterloo, I talked with Mr. Lacey who is in charge of the Jerome Forwarding Company and I told him I thought we would ship a lot of completely denatured alcohol from Waterloo to Syracuse and asked him if his concern would like to handle that business. They were trucking completely denatured alcohol from Long & Company to concerns in New York City. He said he did not know if his concern would handle that, but he would talk to them, and that if they wouldn't, he would like to go in business for himself. The Jerome Forwarding Company didn't take any contract with the Waterloo, but the Bijou Forwarders did. The only party I knew them to be was Mr. Lacey. I first met Mr. Lagier about the 5th or 6th of October, 1926, at the Waterloo Distilling Corporation. He came up with several

trucks. He represented the Bijou Company. When I saw Mr. Lacey the second time, he said he and several other men would organize a trucking corporation to do this particular work for us and I informed him he would have to send a couple of men to see that this merchandise we shipped to Syracuse was guarded and protected, and when [fol. 197] I first saw Mr. Lagier, he informed me that Lacey had sent him up to Waterloo for that particular work.

The District Attorney has shown me the contract for telephone and for some warehouse signed by me as the Standard Solvents Corporation. A few days before I left New York for Waterloo, I saw Joe Beck and R. Beck was present, and he said that he had several places in Syracuse he would like for a warehouse, and while I was going up, they asked me if I would mind stopping off and renting this place for them. They gave me $250.00. I paid $225.00 and signed the contract for the lease at 1108 West Genesee Street, and I also paid the first installment to the Telephone Company. On reaching Syracuse, I visited several places that Mr. Beck told me to go and see, and he particularly mentioned the one place that was just suited for his purpose, and I ascertained who the owner of the premises was and went to see the party named Dawley, who I understood was the renting agent, and he referred me to Mr. Higgins, to whom I paid the $225.00. Government's Exhibits 25 and 26 are in my handwriting in ink, and that is a photograph of my signature signed to the telephone contract. It is not my natural handwriting, as I had a sore finger at that time and I don't recall exactly how I used my pen or pencil but I know I couldn't write very distinctly. I did those things at the request of Joe Beck. I had not been to Waterloo yet but was on my way up there and stopped at Syracuse. [fol. 198] When I got to Waterloo, Mr. Rodenberg was in charge and between forty and fifty men at work operating the plant. I took charge October 4, 1926. Mr. Rodenberg left Waterloo a few days after October 4th for his home. The Waterloo then started to manufacture completely denatured alcohol No. 5 under my supervision, during which time there was a Government representative there at all times. The Government representative Fred Tanner was on from eight to four in the afternoon. Yost was on from

four to twelve and Albert Jackson was on from twelve to eight in the morning. Agent Fred Tanner was in charge of the bonded warehouse and the distilling proper during the day. It was all grain alcohol we made. It was stored in the distillery proper in iron vats. No employee of the Waterloo Company could gain access to any of this alcohol in the course of manufacture without the keys that were held by the Government official. If we wanted to take a sample of alcohol to determine the quality of it, we had to notify the agent that was in charge at that particular time, and he would come to the distillery proper and open up whatever container we desired with the keys that were in his possession, and after that we could take whatever samples were necessary. The pure alcohol was sealed in certain receptacles under lock and key in the distillery proper. The particular agent in charge at the particular time had keys. This alcohol was pumped from the distillery proper to the bonded warehouse through a pipe line, with all breaks, [fol. 199] unions and couplings sealed by Government agents. There was a tape around all couplings and unions, which were sealed with sealing wax, so that at any time a Government Agent came through and inspected the plant and saw if any thing was broken he would immediately report it. There was a lock at the beginning and at the end of that pipe; one in the distillery proper and the other in the bonded warehouse, and the keys for both those locks were at all times in the possession of the gauger in charge. In the bonded warehouse, it was held in the tank where distilled water was added to bring the proof down to 190 and then the alcohol was drawn into drums. The net weight, the wine gallons, proof gallons was determined and stenciled on to the drum, with the name of the distillery, the district in which it was located, the bonded warehouse number and the serial number. There was no way of entering the bonded warehouse without the knowledge of the storekeeper-gauger in charge. The alcohol was conveyed from the bonded warehouse to the denaturing plant in drums similar to Government's Exhibit 64. After the alcohol was placed in the drums, they were closed up tightly. This was done in the presence and under the supervision of the gauger in charge of the bonded warehouse, Mr. Tanner at that time. It was about 500 feet from the bonded ware-

house to the denaturing plant, where I was in charge for the Waterloo Company. When the drums ordered from the bonded warehouse arrived at the denaturing plant, they [fol. 200] were first checked to determine the right serial numbers from the bonded warehouse and the exact contents of each drum. Before the alcohol was turned into drums, the proof was reduced to 190 under the inspection and supervision of Government officials, at this time Mr. Tanner, and this was reported to the Government every day as the packages were filled and by special monthly report. All of them are not in evidence but enough to give us an idea of what they are. The alcohol was placed in a tank of 5,875 gallons, with the Government Agent stationed there. After we ascertained what was required and compared figures with the Government Agent as to the different ingredients required, we would take the denaturants out of the denaturing material room and pour this into the mixing tank and after all the denaturants were added to the alcohol, it would be thoroughly agitated from ten to twenty minutes by air. After this was done the empty drum would again be weighed to ascertain the tare, which was marked on in chalk. The tare of the drum is the net weight of the drum empty. After the tare weight is arrived at by weighing the drum was filled with the denatured alcohol and then weighed and the tare deducted and then arrive at the net weight. This figure was then checked with the gauger's manual, to ascertain the number of gallons in alcohol. Then the drum was stencilled with whatever formula, wine gallons, serial number, name of denaturing plant, and the number, and the district in which it was located. The [fol. 201] gauger in charge dealt out the denaturants from the denaturing material storage room. All specially denatured 40 at the denaturing plant when I got there is still there today. There is more today than there was at that time. This last was manufactured the latter part of May and June, 1927. We had some 43. I would measure the brucine that we put in, 40 in the presence of the storekeeper gauger in charge of the denaturing plant. Part of the time Mr. Jackson was in charge and part of the time Mr. Takel, and Mr. Bachron was there as a prohibition agent. If there was any work to be done at the denaturing plant the prohibition agents would always make it their

business to be there, and they signed these daily reports, together with the Government official—the storekeeper-gaugers from the Internal Revenue Department who was there at all times and the majority of the time two prohibition agents were there. The Internal Revenue Department men didn't sign those reports. The majority of the time three of the Government representatives were in the denaturing plant when we would denature, and at all times two prohibition agents would sign these reports. The storekeeper-gauger in charge had the key to the denaturants, but the Prohibition men did not. No one could get into where the denaturants were kept except with the knowledge and consent of the Internal Revenue men and by the means of his key.

We gave a $100,000.00 bond for the alcohol manufacturing plant, a $100,000.00 bond for the bonded warehouse and a $100,000 bond for the denaturing plant to the Government.

[fol. 202] After the alcohol was denatured, it was shipped to the Standard Solvents & Chemical Company at Syracuse, New York, in drums, like Exhibit 64 and stencilled as I have stated, and carried by truck. The drums were checked by myself, the Internal Revenue man and Prohibition agents on to the truck, to ascertain that the correct serial numbers were on the particular drum, to correspond with the delivery receipt handed to the driver of the truck. When the truck left the Waterloo Company premises, our responsibilities then ended. From the time the grain came into the Waterloo premises until it left it in tanks, it was under the constant supervision of Government men at all times.

Around October, we repaired the bridge on the road leading from the distillery to the denaturing plant. The house that was at the entrance to the distillery was built in the early part of November, 1926. The Waterloo Company owned one five-ton Mack truck. I don't know how long it owned it. It was used around the plant for hauling grain and grain alcohol, sand and gravel, and anything that was needed. It was not used for delivery at all. When Lagier or the Bijou came up under our contract they had two seven and a half ton Mack trucks. Under our contract, Bijou was to receive $1.00 a drum for trucking from Waterloo to Syracuse. There are at present of this style and descrip-

tion of drums used on the premises of the Waterloo Distilling Company about four thousand that were brought from P. I. W. Second-hand drums were sold quite often [fol. 203] and are just as good for second filling as new drums. They are washed out thoroughly by steam and acid. Not many came back of a lot sold. I think Joe Beck moved up to Syracuse about the first or second week in October, 1926. Government's Exhibit monthly report is a sample of the report that the Waterloo and similar distilleries make to the Government of the activities of the denaturing plant during the month. The form 1468-A is a monthly report, the first page of which refers to ethyl alcohol received and disposed of at the denaturing plant; the second page, the denaturants used at the denaturing plant and the third page is a summary of the denaturants used and on hand at the end of the month and on hand at the beginning of the month and the denaturants used for each particular formula, the denaturing alcohol produced and disposed of at the denaturing plant, showing the completely denatured alcohol, specially denatured alcohol produced, the serial numbers, number of packages, the wine gallons, to whom it was shipped and the quality. The last page is a summary of denatured alcohol produced and disposed of, showing the kind of alcohol manufactured at the denaturing plant, what was shipped, what was on hand at the beginning of the month, and what was on hand at the end of the month. These reports are not signed by any Government agent but they are stamped by the storekeeper-gauger in charge at the time they receive these reports from us, when they are given to him to check over. The Internal Revenue man [fol. 204] sends them in each month, one to the Collector of Internal Revenue, one to the Prohibition Commissioner in Washington, and one to the Prohibition Administrator of Buffalo, so that everything that is done in such a plant is checked continually from the time the grain goes in until it is put in tanks, and there is a duplication check made by the Government officer at the end of every month.

The daily and monthly reports are all checked over by the man at the denaturing plant or by the man at the bonded warehouse. My father was assistant to me. Charles H. Fingerhood was at no time a Sales Manager for the Waterloo Company that I know of. He never held any office until April, 1927, at the Waterloo Distillery that I know of, nor

that I know of was he elected on the Board of Directors until he was elected President April, 1927. He was up there several times. He usually came in the morning and left the same evening. I can't remember that he stayed more than two days. I made daily reports of the activities of the plant and financial condition for the Austin-Bagley Company and mailed it every day to the Austin-Bagley Company, and kept copies. I recall from the time I took charge of the plant until January 1, 1927 that Mr. Fingerhood was there about three times.

I presume there are about sixty drums of denatured alcohol at the Waterloo plant now, and there were about twenty-three when I took charge of it, and which were there from the latter part of 1924. There was a separate room in [fol. 205] the building, with a separate lock and key, which the storekeeper-gauger had, in which the denaturants were kept. The denaturants were kept in the drums on racks. There was one small shelf with a scale on it in the room. Access to the room was only had by the gauger. There were five or six electric lights there and two windows that were closed with iron shutters.

Form 1440, which shows daily, in gauge, and withdrawals of alcohol from the bonded warehouse, No. 130 of the Waterloo Distilling Company on December 1, 1926. That is the report made by the Waterloo Distilling Corporation, signed by the officer in charge and also by the storekeeper in charge of the bonded warehouse, showing the alcohol withdrawn from the bonded warehouse. In October, November and December, Fred J. Tanner was the Storekeeper-gauger. These reports were delivered to Mr. Tanner at that time and he stamped the time he received them, the one copy was sent to the Prohibition Administrator, another copy to the Collector of Internal Revenue and a third copy to the Prohibition Commissioner in Washington. The report shows the serial numbers, packages that were withdrawn from the bonded warehouse, the gross weight of the package, the wine gallons, the proof of the alcohol, the proof gallons, the number of gallons that this alcohol entered into the bonded warehouse, and would show the loss, if any. It shows the number of the transfer stamps. Form 1467, which is the detailed report of denaturants used at the denaturing plant, shows the proof of the alcohol after it

[fol. 206] leaves the denaturing plant. Form 1467, are the reports for the month of October, 1926. The reports for October 11th, 12th, 13th, 14th, 15th and 16th, signed by me and the Government Gauger shows the proof of the alcohol manufactured by the Waterloo plant on those days to be 190. Government's Form 1440 shows the return of alcohol gauged and entered into the bonded warehouse from the distillery. It shows as the packages were filled, the days they were filled, the proof of alcohol, serial number, gross weight of package, tare, net weight, wine gallons, proof gallons and proof from the plant into the bonded warehouse. These reports show that the alcohol was not withdrawn the same day they were entered into the bonded warehouse. The alcohol drawn from the bonded warehouse on October 12th was manufactured October 1st. The alcohol withdrawn on October 13th was manufactured on October 1st and which was 190 proof. Some of the alcohol withdrawn on the 12th was manufactured on October 4th, and the proof was 190, and alcohol withdrawn on October 14th was manufactured October 1st and that of October 15th was manufactured on October 13th, and the proof was 190. Some was manufactured on October 14th, and withdrawn on the 14th. The proof was 190. If the alcohol was in the bonded warehouse more than seven days and was then desired to be withdrawn, a re-gauge had to be made of every individual package to ascertain if the proof was still as it was entered [fol. 207] into the bonded warehouse, and if there was any loss or any loss determined or any gain, would have to be entered in column 5 of this sheet. Form 1440, being reports of withdrawals from the bonded warehouse October 11th, 12th and 13th, also 14th and 15th, show there is no report for October 12th as received at the denaturing plant. It shows that 190 alcohol was received at the denaturing plant October 13th, 14th and 15th. The alcohol was 190 proof when it came out of the plant in the bonded warehouse, the same proof when it came out of the bonded warehouse into the denaturing plant and the same proof when it came out of the denaturing plant. Completely denatured alcohol was not necessarily shipped the same day it was manufactured. Sometimes we did not get it off until the next day and may be only shipped it several days after that. The Agent's report and the monthly report, Form 1468, showed the amount of denatured alcohol at the end of any particular

date. Government's Exhibit shows that the Government's agents certified to be on hand on the night of October 10th—eleven packages of specially denatured 39-A twelve packages of specially denatured No. 40; twelve packages of completely denatured alcohol No. 6. The package means either a drum or barrel there. Formula 39-A means specially denatured alcohol. That was manufactured the latter part of 1924. The same number of drums of specially denatured alcohol No. 40 have been there for four years. C. D. 2, C. [fol. 208] D. 5 and C. D. 6, are the formulas for completely denatured alcohol. The report of October 12, 1926, shows received at the denaturing plant, manufactured in C. D., a total of 125 packages, of which 100 were shipped out and 25 left on hand at the end of the day, and also eleven packages of 39-A, twelve packages of 40, eleven packages of C. D. No. 2, and six packages of C. D. No. 6. These reports, of which I have read a couple, show the amount manufactured, the amount shipped and the kind and amount on hand each day. The reports which are signed by the Prohibition Agent and consigned to the plant. Government's monthly reports, are not signed by the Prohibition Agent but by the agent of the Collector of Internal Revenue. On October 11th and 12th, 1926, the denaturing of the alcohol was conducted on the floor of the denaturing room because the pump that was used to pump the alcohol into the mixing tank was broken. I called the Prohibition Department and spoke to Mr. Harper. I explained to him, and he referred me to another party, who, I believe, was Mr. Crehan, and I reported to him. Before calling Mr. Harper, I notified Mr. Chamberlain and Mr. Jackson. On October 11th, 50 drums were received at the denaturing plant, 50 drums of completely denatured alcohol No. 5 were manufactured and 50 drums of completely denatured were shipped to the Standard Solvents & Chemic. Company. Prior to the morning of October 11th, there were 1373½ gallons C. D. 5 on hand in the denatured alcohol storeroom. The 50 drums C. D. 5 [fol. 209] were loaded on the trucks of the Bijou Forwarding Company and sent to the Standard Solvents & Chemical corporation, Syracuse, New York under contract. When this merchandise was delivered to the driver, we made out a delivery-slip which showed the name of the Standard Solvents & Chemical Corporation, their address, the number of packages, the serial numbers that were being shipped.

The driver would take these slips, leave one at the Standard Solvents and bring the duplicate back signed by some official of the Standard Solvents & Chemical Company. Defendant's exhibits are all receipts that the Waterloo used. They show the amount of packages and date received from the Waterloo Distilling Corporation in good order to the Standard Solvents & Chemical. It is signed "J. B." meaning "Joseph Beck". Those particular slips are for October 11th, 12th, 13th, 14th, 15th and 16th, and the others are for the rest of October, November and December. The drivers of the trucks that delivered our alcohol to the Standard Solvents got a receipt for each load delivered on paper similar to this receipt. On the receipt for October 11th, appears 50 drums of completely denatured alcohol we delivered to the Standard Solvents, and I know positively that it was completely denatured alcohol and went out under supervision of one or more Government officials in broad daylight, properly stencilled and marked, and on October 11th, 1926, no specially denatured alcohol was manufactured or shipped, and at that time there were 23 packages [fol. 210] of specially denatured alcohol on the Waterloo premises. These were the packages that have been there since 1924. On October 12th there was no specially denatured alcohol manufactured or shipped. Completely denatured alcohol was shipped to the Standard Solvents & Chemical Corporation, and the truck brought back the receipt to me. On the 13th, no specially denatured alcohol was manufactured or shipped out of the Waterloo Distillery plant, 101 drums of completely denatured No. 5 was manufactured and shipped out of the Waterloo Distillery plant, 101 drums of completely denatured No. 5 was manufactured and shipped to the Standard Solvents & Chemical Corporation, receipt for which is presented. On October 14th, 55 packages of completely denatured alcohol were manufactured and 80 packages of completely denatured alcohol No. 5 were shipped, 11 packages of completely denatured No. 6 to the Standard Solvents & Chemical Corporation, for which I hold receipt here. No specially denatured alcohol was shipped on the 16th. On the 15th, 101 packages of completely denatured alcohol were manufactured and shipped to the Standard Solvents & Chemical Co., Syracuse, New York, for which I hold this receipt, and there was no spe-

cially denatured alcohol made or shipped on that day. On the 16th, 50 packages of completely denatured alcohol No. 5 were manufactured and shipped to the Standard Solvents & Chemical Corporation, for which I hold the receipt here. When that alcohol left the Waterloo plant on the 11, 12, 13, [fol. 211] 14, 15 and 16 under the supervision of two Government men, it was completely denatured alcohol were manufactured and shipped to the Standard Solvents & Chemical Co., Syracuse, New York, for which I hold this receipt, and there was no specially denatured alcohol made or shipped on that day. On the 16th, 50 packages of completely denatured alcohol No. 5 were manufactured and shipped to the Standard Solvents & Chemical Corporation, for which I hold the receipt here. When that alcohol left the Waterloo plant on the 11th, 12th, 13th, 14th, 15th and 16th under the supervision of two Government men, it was completely denatured alcohol No. 5.

I have only passed through the Village or Town of Cayuga. I never stopped there. On the 13th day of October 1926, or at no time prior thereto I never had a conversation with any person in charge of the station or depot of that town. I have seen Mr. Sheehan, the witness who was on the stand. I never saw him prior to the Revocation Proceedings. I never ordered directly or indirectly a car from him. I never had any conversation with any railroad man relative to a car to be furnished me on October 13, 1926. I never talked to Mr. Felter, the Government witness here, the station agent of some railroad here in Seneca Falls. I never superintended or stayed by when a car was loaded with drums of something, either belonging to the Waterloo Distillery or any other person. I was not away from the Town of Waterloo on October 11th, 12th, 13th, [fol. 212] 14th or 15th. On the 16th I went to Geneva to do some shopping with my father and mother. I did not sign the name "John Muller" on Government's Exhibit 27, purporting to be an order for a car. The handwriting on Defendant's Exhibit 53 is my handwriting signed in Court. I did not disguise my hand; I wrote natural. I wrote what I was ordered to write by the Court. The writing on the two letters in Defendant's Exhibit 53 is in my handwriting.

I never knew of any alcohol being shipped about which there was any subterfuge. That what was pretended to be shipped was really shipped. No person directly or indirectly to my knowledge ever diverted any alcohol that left the plant of the Waterloo Company. I never made directly or by means of any person else, any shipment of alcohol from Syracuse in the name of some other merchandise, or from Geneva, and if it was done, it was done without my knowledge.

Those are the papers I received from the drivers who took the drums on their trucks for delivery to the consignee. They are delivery sheets signed by the Standard Solvents & Chemical Corporation and received by me from the drivers. The initials "J. B." on them mean "Jos. Beck," President of the Standard Solvents & Chemical Company, I know his signature. To the best of my knowledge, they are all signed by Jos. Beck, and marked Respondents' Exhibit "E" in Evidence.

(Package of blue sheets from October 21st, 1926 to March [fol. 213] 1st, 1927, marked Respondents' Exhibit "E".)

In the months of November, December, January and February following October, 1926, I received from the drivers papers similar to these for every delivery sent out addressed to the Standard Solvents & Chemical Co., and all that was for C. D. No. 5 with the exception of a few barrels of No. 6 and a few C. D. No. 2.

We stored for the Standard Solvents & Chemical Corporation 735 drums of C. D. No. 5, 11 packages of C. D. No. 2 and 6 packages of C. D. No. 6 in the White Elephant Warehouse on our unbonded property. Prior to storing this alcohol, it was placed on a truck belonging to the Bijou Forwarding Company, for the purpose of being delivered to the Standard Solvents & Chemical Company and for which I received slips of paper similar to those in Respondents' Exhibit "E" in Evidence.

I have testified here that these records show that on October 12th there was no alcohol of any kind on hand at the denaturing plant. There was specially denatured alcohol but that is the old stuff and those few barrels of completely denatured alcohol were on hand. Form 1439, memorandum of alcohol shipped in bond by the Waterloo Dis-

tilling Corporation, proprietor of bonded warehouse No. 130, District 21, of New York, Permit No. 93, to the Waterloo Distillery Corporation, proprietor of denaturing plant No. 130, in the 21st District of New York, Permit No. 99, [fol. 214] showing the amount of packages, serial number, and number of gallons transferred on October 11, 1926, signed by the name of the vendor Waterloo Distilling Corporation, checked and t/ranscribed by the initials "F. J. T.", October 11, 1926, has a stamp when it was received by Mr. Tanner on October 11, 1926, at 1.30 P. M. They show that on October 11th, 50 drums of alcohol were withdrawn from the bonded warehouse for the denaturing plant and the same amount was denatured and shipped. On the 12, 50 packages were withdrawn at 8.30 and 100 withdrawn at 8.30 and were handed to Mr. Tanner at 8.30 October 12th. As a rule, if I handed any requests for withdrawal for 50 packages it would be between about three-quarters of an hour and an hour before they would come over to the denaturing plant, and to denature it would take about two and one-half hours. One hundred drums of C. D. No. 5 were shipped on the 12th. I understand it is 13 miles from Waterloo to Cayuga. On the morning of the 13th, there was no alcohol of the denatured kind to ship in the place between 8.30 and 9 oclock. I think it would take a great deal longer than 25 or 30 minutes to travel the 13 miles to Cayuga.

I saw Mr. Fingerhood around the 19th or 20th of October in reference to certain seizure of alcohol made in Seneca Falls. That's the first time I saw him in the Waterloo Distilling Corporation or in Waterloo. Quite a number of telephone calls from different people came in requesting [fol. 215] that the Bijou Forwarding Company call them for certain work they wanted done. I don't know who they were.

I never talked or connived or confederated with these defendants or with any persons to violate the National Prohibition Law. There is no act that I know of that I have done since I have been President of the Waterloo Distilling Corporation in furtherance of any scheme to violate the National Prohibition Law, and I never had any intent in any way to violate it. I remember seeing Mr. Fingerhood sometime the middle of November, 1926 and again

around Christmas 1926. Those are the only times between October 1st and New Year's of 1926 that I saw Mr. Fingerhood to my best recollection. In the month of October, Jim O'Malley helped denature for several days. He ruptured himself and went to the hospital around the 15th. Several other workmen, whose names I do not recall, were there. The building used for a garage was not on the bonded premises and that is where the Bijou Company kept their trucks.

In going from New York to Waterloo, you go through Syracuse by train. The plant was shut down at different times. I think for a number of years after the Becks left Long & Company, they were in business for themselves. I heard the Government Agents testify that Formula C. D. 5 was changed by the Government in January, 1927, and made another change subsequent, because the Government discovered that people were cleaning the completely denatured alcohol. The Bijou rendered an itemized bill for [fol. 216] the work they had done and when we paid it, they receipted it, and it was filed in our files, but Mr. Avis and Mr. Goldring never returned them after they seized all the papers. I have the receipts from the Bijou Company. The search and seizure was set aside as illegal.

Cross-examination.

By Mr. Templeton:

I was born July 14, 1898 and came to this country December 22, 1902. I became a citizen in 1921. I first met Mr. Fingerhood about 1918 at the Crystal Chemical Company, 134th Street & Willis Avenue, Bronx, New York, where Mr. Fingerhood and my father were employed. I think Fingerhood was an accountant. I worked for the Globe Import Company then. I went to work as chemist for W. H. Long & Company December 10, 1923, and in 1924 I was elected Secretary and Treasurer of the Company. Then my only duties were to take care of the office and the denaturing plant, I had stock in the plant.

Q. How much stock did you have in 1924?

Mr. Newton: I object to that as incompetent and immaterial.

The Court: Overruled.
Mr. Newton: Exception.

A. I do not know how much stock I had that year, but [fol. 217] I held altogether 101 shares of Long & Company.

I am not the Secretary and Treasurer now. Martha Meyers of Waterloo, New York, is Secretary and Treasurer of Long & Company. She was the bookkeeper of the Waterloo Company. She is now the Secretary and Treasurer of Long & Company and was a witness here the other day. I sold to the Waterloo my shares in Long & Company the early part of 1925, at the same time all the stock of W. H. Long & Company were sold to it.

Q. How much did you get for it?

Mr. Newton: I object to that as immaterial.
The Court: I will allow the question.
Mr. Newton: Exception.

A. $5,500.00.

Roscoe C. Harper paid the money to me in cash at his office, and I am pretty sure on the day the $50,000.00 was paid over I think I was present when the $50,000.00 was turned over. Government's Exhibit and affidavit signed "Ludwig Baur" is my affidavit, and in signing it I stated I read the affidavit of Dio Govini, and the facts therein were true. That affidavit says about March 26, 1925, the Waterloo Corporation bought 1,000 shares of stock, being all the stock of W. H. Long & Company, Inc. Mr. Fingerhood was not a stockholder of Long & Company and had no personal relations with it. I did not see him a great number of times in Long & Company. I bought some of [fol. 218] my stock in Long & Company in 1924, but I was a chemist there in 1923, but I don't recall seeing Mr. Fingerhood there at Long & Company's plant in 1923. He was possibly there in 1924, but I wouldn't say definitely. I was its Secretary and Manager. Mr. W. H. Long, Jr., and several Government Agents were there at the time. In the latter part of 1924, Max Rein was an employee there and he is the man that went on my bond in this case, and I think the latter part of 1924 he was elected President of W. H. Long & Company in place of W. H. Long, Jr., I don't know

to my knowledge that Rein is still president, but he possibly was when I was president of Waterloo. The business of W. H. Long & Company was denaturing alcohol. They bought alcohol from Greendale Company, some concern in New Orleans, the Jefferson Alcohol Company, I think the Waterloo Distilling Corporation, and a number of others, if I remember correctly. We bought pure alcohol from the New Orleans Company and I presume it was made of molasses. J. Beck was an employee of Long & Company sometime, but I don't remember when, and R. Beck was an employee. I couldn't tell the exact date. I don't remember if it was in 1925, but I think not in 1926. They were not employed there when I was chemist, and I can't say whether it was when I was Secretary and Treasurer. I couldn't say definitely how long they were employed there. I presume it was little more than a week, maybe six months, maybe a year.

Q. Two years?

[fol. 219] A. I tell you I can't say what time; I know they were employed.

I paid them every week. I don't remember how much, I haven't the books. I don't know where they are. I am not an officer of W. H. Long & Company. I don't know who are the officers. I know Miss Martha Meyers was elected Secretary and Treasurer after I resigned the office in 1927 from Long & Company. I couldn't say whether J. Beck and R. Beck were employed a month or three years. The duties of J. Beck and R. Beck with Long & Company were to help me denature alcohol. They would take drums out of the bonded warehouse where the pure alcohol was stored, roll them to the drive, dump them into the mixing tank, add the denaturants after I measured them out under supervision of the Government man, stencil the drums, weigh the drums, fill them, load them on the truck, and do whatever work was necessary to be done around the plant. They were laborers at W. H. Long & Company's plant, but I couldn't tell how long they were there. From the time 1924 until I ceased to be Secretary and Treasurer there were quite a number of other laborers there. The concern I refer to in New York that Joe Beck was connected

with was Cameron, Bailey & Hoe, 1559 Boone Avenue, Bonx, New York, but I don't remember what his official position with them was. Long & Company had a contract then with Cameron, Bailey & Hoe that they would buy completely denatured alcohol from us. I don't remember when the contract was made, but if you show me the Government [fol. 220] reports of Long & Company, I can tell you. Long & Company then sold Cameron, Bailey & Hoe, and Joe Beck was then an officer of Cameron, Bailey & Hoe, but what I don't remember, but R. Beck was not in Cameron, Bailey & Hoe. Long & Company did business with Abbott Davis. I have heard of Ralph Beck & Co., Inc., and the Ralph Beck there was of that Company. I have known him by the name of "Randolph" and "Ralph", but I don't know which is his name. I don't remember that Long & Company sold Ralph Beck & Company, but I could tell from Government reports. I wouldn't say without looking at the Government reports. Joe Beck was not attached to Ralph Beck & Company that I know of, and I don't think I was ever at Ralph Beck & Company myself, but I was at Cameron, Bailey & Hoe. That was just a storage warehouse where they stored drums of alcohol. I think Joe Beck was an officer of that company. I am pretty sure he was. I guess he worked around that plant handling drums of alcohol. I am not related to Mr. Fingerhood. I don't know that Max Rein, President of Long & Company is related to him. After my father left Long & Company, where Fingerhood was an accountant, he came to Waterloo. He was connected with the Standard Ethyl & Solvents Company, but I couldn't say any definite date. I was in the plant maybe five or six times to see my father, but I never saw Mr. Fingerhood there. Possibly indirectly I talked [fol. 221] with Fingerhood at the Standard Ethyl & Solvents Corporation. By indirectly I mean just to ask how things were going. My father, when he finished with the Standard Ethyl & Solvents went to the Waterloo Distilling Corporation the latter part of 1925, after Waterloo had purchased Long & Company and before I went there, and when I was still Secretary and Treasurer of Long & Company a subsidiary. Long & Company consisted of a denaturing plant, a denaturant material storeroom and an

alcohol room and an office. There were two large pumps, two troughs, a weighing scale, one very large tank for the storage of alcohol, eight mixing tanks, an air pump, five denaturing tanks for the storage of denaturants and a storage material room. The air pump was operated by a motor, a compressor and a tank. I don't know how much the entire machinery and equipment of Long & Company cost. I never bought equipment like that. I cannot appraise the value of machinery. I did the shipping for Long & Company, and Jerome Forwarding Company located on Kingsbridge Road, Bronx, New York, furnished the trucks. I don't knew the officers of the Jerome Avenue Forwarding Company. When I did business with them for Long & Company, I dealt with a Mr. Lacey. I think his name was Joseph Lacey. I don't recall stating to Prohibition Agent Hanson that the Jerome Avenue Forwarding Company was run by Gass & Company and I had known them from the time they were little boys. I know the Gass brothers but not by their right names, one is nicknamed [fol. 222] "Dutch" and the other "Nigger".

Lacey is the only man I did any business with in connection with the Jerome Avenue Forwarding Company, and I don't remember who their drivers were. The Waterloo Distillery is a stockholder of Long & Company. I don't remember when they had any meetings to elect any Directors of Long & Company. I was President of Waterloo. As I remember, the last meeting of Long & Company for election of Directors was in August, 1927, when I had no stock in Long & Company. Mr. Rein was President of Long & Company, when all the stock was bought by the Waterloo and he continued as President from 1924. There was possibly an annual meeting of the stockholders of Long & Company since 1924, I don't remember when. There was not of my knowledge a meeting of the stockholders of Long & Company from the time I took office as President of Waterloo in 1926. I can't state where the profits of Long & Company went for 1925. They made no profit during the time I was President. Long & Company made an income tax report. It looks as if Long & Company were kept separate from the books of the Waterloo Distilling

Company. All the tax matters were handled by the accountant, Becker or Rosenberg. They share offices with Mr. Fingerhood in New York. I was at the home of the Becks when I informed them I was going to Waterloo and they said if I was going up there, if I would mind stopping [fol. 223] off at Syracuse and look at a place or renting a place that they had picked out, and they gave me the address, and also told me who the renting agent was, and asked me to look up the address, which I did. They gave me $250.00. When the Becks were with Long & Company, I don't think they were paid over $50.00 a week. I can't say I paid them over $40.00 a week. The "R. Beck" and the wording Standard Solvents & Chemical Corporation, R. Beck, President" on Government's Exhibit 25, are in my handwriting.

My middle finger was sore at the time I wrote them. I couldn't write properly with my sore finger. I didn't try to disguise it. I did not tell Mr. Little that I represented the Standard Solvents & Chemical Corporation or the Telephone Company. R. Beck was not an officer of the Standard Solvents & Chemical Corporation. I tied up the corporation for six months at $225.00 a month rental with the authority of the Becks, whom I thought were interested as officers of the Standard Solvents. I did them a favor as a friendly act. My father had no stock in the Waterloo. I know nothing about Austin-Bagley as a holding corporation for Waterloo, for which I made daily reports to Austin-Bagley Corporation to their office, 50 W. 57th Street. I presume Mr. Fingerhood is there. It is possibly Fingerhood's office. It is the office of the Austin-Bagley Corporation. Mr. Fingerhood has a desk there. I don't know any of the officers of Austin-Bagley. I presume Mr. Fingerhood is an [fol. 224] officer. He never told me he was. Before leaving New York I had a talk with Fingerhood about Waterloo. When I got to Waterloo, I had a talk with him about becoming President of the Waterloo. I was elected President of Waterloo October 4, 1926. The officers were Lester R. Rodenberg and Vincent Lebate. Rodenberg said to me, "We will elect you President". Exhibit 83 shows minutes of the meeting of the Board of Directors, of the Waterloo Distilling Corporation, held in New York City, October 4th, which shows that Ludwig Baur was elected Director of the

Corporation, and thereupon Rodenberg resigned as President, and on motion Mr. Ludwig Baur was made President. I didn't sign the exhibit. The day I became President, Rodenberg was in Waterloo. I don't know anything about the paper. The books of the Corporation were not in my possession and I don't know where they were. As I understand it, the Secretary and Treasurer keeps the books and that was Vincent Lebate. After this election of October 4th, I don't remember when the next meeting of the Board of Directors of the Waterloo Distilling Corporation was. We had a meeting April 11, 1927, when I resigned as President of the Waterloo at Waterloo, and Charles H. Fingerhood was elected President. I resigned because I thought I would have other business to attend to in Buffalo. I was going to open an office there to represent the Waterloo. At the meeting where I resigned at Waterloo on April 11, 1927, [fol. 225] Mr. Labate was not present. I don't remember sending any notice of Directors' meeting. I am pretty sure Mr. Fingerhood was present. That is Mr. Fingerhood's signature on Exhibit 12.

Mr. Templeton: I now ask to have this marked in evidence.

Mr. Newton: I object to it on the ground that that is after the time charged in the libel, April 11, 1927.

The Court: I will receive it.

Mr. Newton: Exception.

(Exhibit 13 for Identification marked Exhibit 13 in Evidence, and read by Mr. Templeton.)

At the meeting where I resigned at Waterloo on April 11, 1927, Mr. Labate was not present; I don't remember sending any notice of Directors' meeting. I am pretty sure Mr. Fingerhood was present. That is Mr. Fingerhood's signature on Exhibit 12, which purports to be a letter of April 11th, written from Waterloo, and attached to it is an affidavit as to a certified resolution, signed by Mr. Labate as Secretary. Mr. Labate was not at the meeting. Mr. Labate should not have signed the papers if he was not in Waterloo. I don't know who asked him to sign them. My resignation was verbal over the telephone. I don't know who was at the other end of the 'phone of my own knowledge. The initials "C.H.F.—MM." indicated the letter was dic-

tated by Mr. Fingerhood to Martha Meyers. I didn't resign [fol. 226] with Mr. Fingerhood sitting right in the office. At the meeting at Waterloo, Mr. Fingerhood, my father and I were present. My father was not a Director of Waterloo.

I went to Syracuse between October, 1926, and the early part of 1927, but I never saw R. Beck there. The first time I saw him was possibly the early part of 1927. When I went to the Standard Solvents & Chemical Corporation of Syracuse, I saw Joe Beck. I don't know when R. Beck came up to Syracuse of my own knowledge. As President of the Waterloo, I commenced to do business with the Standard Solvents & Chemical Corporation October 11, 1926, through Jos. Beck. I never saw R. Beck at the plant of the Standard Solvents. I never knew until June or July, 1927, that R. Beck had ever been an officer of the Standard Solvents. From the day I became President, I sold the entire product of completely denatured alcohol to the Standard Solvents & Chemical Corporation. That was the only alcohol we sold and was the entire output of it. 4,158 packages of completely denatured alcohol No. 5; 11 of completely denatured No. 2 and 6 packages of completely denatured No. 6, each package contained between 50 and 55 gallons. The total price of it was $67,000.00. As President of the Waterloo I never had the financial standing of Joe Beck or the Standard Solvents examined through Dun & Company or any bank. They paid for it by checks signed [fol. 227] "Jos. Beck, President," which I deposited in the Waterloo Distilling account in several banks, George B. Zartman & Company, First National Bank of Waterloo. When I became President, I had no talk with Mr. Fingerhood about the $50,000.00 note which was given to his wife, with the proceeds of which Long & Company's stock was purchased. I found out later it was on the books of the Waterloo. There was no interest paid on that note to my knowledge. There never was any discussion about that $50,000.00 between Fingerhood and me. I just told him I saw the $50,000.00 note on the books. I asked him what the $50,000.00 note was. He said it was money loaned to the Waterloo Distilling Corporation. I did not know when I was President of the Waterloo that they certified they had no obligations. The company had obligations outstanding

for care of grain besides the $50,000.00 note. Austin-Bagley loaned to the Corporation money. I don't remember exactly how much; I have to look at the books to determine that. I have not the books of the Company. They are not here. As President, I drew $70.00 a week, and my father $100.00 a week as chemist. Mr. Fingerhood drew nothing at all. Our average payroll was $600.00 a week, which included my father's and my salary. We paid $1.00 a drum for trucking. The property was assessed by the Village at $66,000.00, and the Town, County and State at $100,000.00. The total tax was about $2,200.00. The cost [fol. 228] of production per gallon was 25 cents, which we sold for 31 cents f. o. b. Syracuse. We have on hand about 3000 drums of manufactured alcohol. The Bijou trucks came up to Waterloo the early part of October. Mr. Lagier was sent up to take charge of the Bijou. I don't know what his official capacity was then. I think I know now he was Secretary or Treasurer, or something like that of the Bijou. In the beginning I dealt with Mr. Lacey. I sent checks by mail to Syracuse to pay the bills for carting. While I was President, no report was made to the Government. When I said that an income tax report was filed in New York, that was for W. H. Long & Company. I never got a report of the activities of the financial or other conditions while I was President of the Waterloo, though the Waterloo owned all the stock of Long & Company. I never ascertained a thing about the finances of Long & Company from October 4, 1926, to April 11, 1927. I never talked to Mr. Fingerhood about Long & Company or over the telephone to somebody I didn't know was on the other end since I became President of the Waterloo Distilling Corporation. I didn't sell to Long & Company while I was President, as I can remember. I had been the Secretary and Treasurer of Long & Company. I never discussed with anybody the affairs of the Waterloo Distilling Corporation of the affairs, financial or otherwise, of Long & Company with Mr. Fingerhood. I don't know if the Waterloo owed Mrs. Fingerhood [fol. 229] $50,000.00. It appeared as a note payable on our books. Mr. Fingerhood never told me that was a note to his wife. I knew there was a $50,000.00 note payable as President, but I didn't know to whom it was owing. I never owned stock in the Standard Solvents. I never owned any stock in the Waterloo Distilling Corporation or

in Austin-Bagley. The only stock I ow-ed was that of Long & Company, for which I got $5,500.00 cash. I have testified with reference to Exhibit "E", that the letters "J. B." which appear in lead pencil on that exhibit on the various sheets is in the handwriting of Joe Beck. I have seen him sign his initials alone without his name. I don't remember when, quite a number of times. I am able to identify his initials but not his signature. The three bonds of $100,000.00 each were written by agents Gertan & Zeitz, a bonding company, for 1 per cent—$3000.00. I don't know what security the Waterloo put up for that $300,000.00 bond. It was in effect when I took charge. I was President of the corporation. These bonds were in effect before I took charge. They were renewed during my time. We paid on $220,000.00 insurance on the plant. I would have to look at the book to find out the amount of premium.

The daily reports were all checked by Government officers. No Government officer signed them between November 11th and January, 1927. I know they were handed to Mr. Jackson, who received them from October 11th until January 1, 1927. In October, November and December, [fol. 230] 1926, Government officers Chamberlain, Murphy, McQuaid, Maloney, Weller and several others I don't remember were assigned to the plant. Exhibit — shows the names of the Government, officers on the reports as follows: October 25th, 26th, 27th, 28th, 29th, 30th, November 2nd, 3rd, 4th, 5th, 6th, 8th, 12th, 22nd, December 3rd, 4th, 5th, 7th, 8th, 9th, 10th, 11th, 27th, 28th, 29th, 30th and 31st, 1926—Mr. Chamberlain and Mr. McQuaid; on November 9th, 10th, 13th 15th 16th, 20th, 23rd, 24th, 26th, 27th, December 2nd, October 11th, 12th, 13th, 14th, 15th, 16th, 18th, 19th—Mr. Chamberlain alone; On November 17th, 18th, 19th, December 20th, 21st, 22nd, 23rd, and 24th—Chamberlain and Mr. Murphy; on November 29th, 30th, December 1st, 9th, 10th, 11th, 13th, 14th and 15th—Mr. Chamberlain and Mr. Maloney and on December 16th, 17th, and 18th Mr. Leroy A. Weller. Between the 11th and the 18th of October, Mr. Chamberlain was the only Government Prohibition Agent assigned to the plant. Mr. Jackson had all the keys of the denaturing plant. We could not get into the denaturing plant unless Mr. Jackson permitted us to. William O'Malley was Chief Engineer in our plant at

$45.00 a week. I fixed my salary myself, and I don't know who fixed my father's salary, and I fixed Mr. O'Malley's salary. I never gave anybody instructions to go down to Geneva with respect to a shipment. I gave instructions as to the work that was to be performed around the plant. I did not give my father instructions. He was the chemist [fol. 231] of the plant and superintendent of the production of alcohol. Form 1468A shows that we sold on December 9th 150 drums of pure grain alcohol to Long & Company. When I sold pure grain alcohol, I dealt with Mr. Max Rein and I don't know what he was drawing salary for. After I became president of Waterloo, I don't know what happened down at Long & Company. The exhibit shows they received some merchandise from us by rail and truck through the Bijou Forwarders on December 9, 1926. This trucking company did not carry the bond of the Waterloo. The exhibit shows the date of incorporation as December 27, 1926. I don't know anything about it. I had nothing to do with the Bijou. I was shipping by some trucks and the Bijou Forwarders carried the shipments from October 11th through November and December. I employed the Bijou Forwarders, Inc. They rendered me bills. I haven't them; Mr. Avis never returned them when he took them in our plant. Mr. Lacey told me they were the Bijou Forwarders, Inc. He was the only man of the Bijou Forwarders I knew when I employed them the early part of October or the latter part of September, 1926. I think there was $2500.00 paid the Bijou Forwarders by the Austin-Bagley Corporation because they needed money at that time and the balance was paid by check of the Waterloo Distilling Corporation. The Bijou Forwarders called me up and I said I didn't have the money in the bank and they should go to Austin-Bagley and tell them I sent them there and that they should give them $2500.00. I had that [fol. 232] conversation with Mr. Lacey April 15, 1927. The books don't show the $2500.00 paid from Austin-Bagley. There is an error in the book. It says April 15th, Bijou Forwarders, notes payable $2500.00. The young lady that made this out made a mistake. It is notes payable to the Austin-Bagley Corporation. The only money we received from Austin-Bagley while I was President was $15,000.00, which we borrowed from them. It says so right

in the books. The loan of $15,000.00 according to the general ledger must have been made in 1928 though I was President in 1926. I wasn't certain of any. I would have to look at the books. I thought it was 1927. The first page of the Austin-Bagley book shows a total of $209,467.32 advanced from Austin-Bagley to our corporation from May 27, 1925 to January 31, 1928.

Mr. Newton: I move to strike out the last sentence upon the ground it is incompetent, immaterial and after the time charged in the libel.

The Court: Motion denied.

Mr. Newton: Exception.

The first page of the Austin-Bagley book shows total offsets for 1925, 1926, 1927, at $29,000.00, leaving $209,000.00 owing Austin-Bagley. The note of $50,000.00 in the book of March 16, 1925, I don't know anything about. The bookkeeper told me it was a note payable. We paid all our bills to the Bijou—$1.00 a drum. Their trucks were [fol. 233] stored in an old fire house not on the bonded premises of Waterloo Distilling Company but on the real estate owned by the Waterloo. They paid $15.00 a month rent. There was no lease. The arrangement was verbal with Mr. Lagier. I paid Mr. Lacey of the Bijou Forwarders. The payments do not appear on the books; it was petty cash. The books show after I became President from October 11th to April 11, 1927, the Bijou did all the shipping. The biggest part of the time Mr. Lagier was up there. We kept a petty cash book. When the money was used up we destroyed it. Exhibit 24 is a permit for the Waterloo to sell the Greendale 10,000 gallons of specially denatured alcohol No. 40 a month and it was cancelled March 17, 1927. It was granted just a week before I became President. It was cancelled because they requested it. There were no withdrawals made under the permit. I never talked to Mr. Fingerhood about this $209,000.00 obligation to Austin-Bagley. I knew Mr. Fingerhood was some officer of the Austin-Bagley. When I went up to Waterloo I talked to Mr. Fingerhood about being President of the Waterloo and I made daily reports to the Austin-Bagley Corporation showing what was done every day but there was nothing with reference to this $209,000.00. I never talked

to Joe Beck about this truck. The truck was stored in the same garage with the other trucks. That is my signature on Exhibit — as President of W. H. Long & Company. The [fol. 234] affidavit of Patrick Farley attached to the Exhibit shows the motor number of the car as 74009. Patrick Farley was a driver for the Jerome Forwarding Company. I don't remember if Mr. Fingerhood dictated that affidavit or not. I could not say that the same trucks that came up to the Waterloo in October remained in our plant until the next spring. Similar trucks were always there. Lagier was the boss handling them. He did not stay there all the time. Lagier was to come up to guard and protect the trucks when they came from Waterloo to Syracuse so that C. D. 5 would not be stolen. We never shipped any S. D. 40 by truck. With reference to the John Muller on Exhibit 27 I never heard of John Muller. I heard Mr. Fingerhood speak about John Muller after this case started. I wanted to find out who John Muller was but I did not find out. Mr. Fingerhood never told me who John Muller was yet I heard him say he knew who John Muller was at the Revocation Proceedings. I don't know John Muller; never saw him. I have not made any effort to have John Muller at this trial. I think after the Revocation Proceedings Mr. Fingerhood made an effort to locate Mr. Muller and as I understood he said he located him, but I don't know of my own knowledge and he did not tell me he did so.

[fol. 235] Leroy A. Weller, a witness for respondents, testified as follows:

Direct examination,

By Mr. Landes:

I am a Prohibition Agent and in October, November and December, 1926, I was connected with the Buffalo Administrator's office. I remember being assigned to the Waterloo Distilling Company. I think I was there from the 16th to the 20th of December, 1926, during which time I know Mr. Chamberlain was assigned to the plant of the Waterloo. I had nothing to do there during those three days with the denaturing. I signed the daily reports which were made and signed by Chamberlain. Nobody ever suggested to me

or asked me to commit any violation of law, rule or regulation. Everything I saw done was done strictly according to the law and regulation and in full view and under the supervision of Government agents.

JOHN A. MCQUADE, a witness for respondents, testified as follows:

Direct examination,

By Mr. Landes:

In October, November and December, 1926, I was a Prohibition Agent attached to the Buffalo office and I was assigned to the Waterloo Distillery off and on during the [fol. 236] three months. My order from R. Crehan was to go to the Waterloo Distillery and assist the agent who was there. I was assigned to the bonded warehouse and distillery proper. At no time during October, November and December, 1926, was I assigned to the denaturing plant of the Waterloo Distillery and at no time in October, November and December, 1926, did I assist in supervising the denaturing. I signed reports indicating what was going on, the total activities for the day at the Waterloo Distillery. It was the custom that both agents sign it. It was necessary for me to sign the reports of the denaturing plant. I could not be at both places. Mr. Tanner and I were at the bonded warehouse. We usually got through around one or two o'clock and then we could roam around the distillery as we pleased. The certificate by me to my superior officer showed what was done in the denaturing plant, so many gallons denatured, how denatured and by what formula, the amount shipped and on hand. I did not think I signed my name to a false report. Every report I signed I signed it certifying it was a true statement of what was done that day as far as I knew. According to the reports two were stationed there and I was one of them. Four different times between October and April 1st, 1927, Mr. Chamberlain and I were both Prohibition Agents stationed at the Waterloo plant and both of us signed those daily reports showing the amount of alcohol denatured and in what formula and how much was shipped and how much on hand. I did not intend to lie to my su-

[fol. 237] perior officer. What I certified to was to my knowledge as far as I know. During all the time I was there I never saw any employee of the Waterloo Distillery Company commit any violation of the Prohibition Laws and no one ever asked or suggested to me or to any other person that I know of that they be permitted to violate the laws. I was over once or twice when the trucks were taking the stuff out. The evidence had to be stencilled.

Cross-examination.

By Mr. Templeton:

The first page of the Exhibit, November 2nd, is the report as to the operation of the distillery proper, gives the amount of grain, grain mash, and opening sealed, and as the day, and the open seals. The first sheets of the report of the day has to do with the distillery and the bonded warehouse, and the second sheet has to do with the distilling plant, and each of us signed both sheets. Mr. Chamberlain usually came over to the bonded warehouse during the day and once in a while during the afternoon I would walk over there. In the morning my duties took me in the bonded warehouse. Both of us signed the denaturing plant report. It was intended to cover the blanket operations of both plants.

[fol. 238] Martha Meyers, witness for respondents, testified as follows:

Direct examination.

By Mr. Newton:

I know Mr. Fingerhood and did in October, November and December, 1926. He is six feet tall, or possibly a trifle taller. He is a trifle taller than Colonel Landes.

In October, November and December, 1926, I knew Ludwig Baur.

Q. How tall a man is he?

Mr. Templeton: I object to this witness being called to pass her opinion on the size, and weight, and everything else, of these persons who are officers of this corporation.

Mr. Newton: Felter passed on it in his testimony, that the man was a short thick set man, and this is offered in rebuttal.

The Court: He was testifying as to someone he saw.

Mr. Newton: The man who signed the name "John Mueller".

The Court: This is not a proper manner of proving the size or weight of anyone.

Mr. Newton: Exception.

Q. Was Mr. Baur in October, 1926, a short thick set man?

Mr. Templeton: I object to this.

The Court: Objection sustained.

[fol. 239] Mr. Newton: Exception.

The small house built at the Waterloo Distilling Company plant was completed the morning after Thanksgiving, 1926. I think it was the 25th.

(Form 129, report submitted by Waterloo Distilling Corporation, covering October, November and December, 1926, and January and February, 1927, marked Respondents' Exhibit F, in evidence.)

On the morning of October 11th, 1926, I went to work at the Waterloo Distilling Company, Waterloo, N. Y., at 8:30 in the morning, and quit at 5 or 5:15. Mr. Baur did not leave the premises that day, except 15 or 20 minutes, for his lunch. I went to work and quit the same hours, October 12th, 1926, and Mr. Baur did not leave the premises that day, except about 15 or 20 minutes for lunch. On October 13th, I went to work and quit the same time, and Mr. Baur did not leave the premises that day, except 20 minutes for lunch. On October 14th, 1926, I worked and quit the same time, as the day before, and Mr. Baur did not leave the premises that day, except 20 minutes for lunch. On October 15th, 1926, I went to work and quit the same time as the day before, and Mr. Baur did not leave the premises that day, except about 20 minutes for lunch. The 16th, Saturday, was a half day, and I quit that day at 12 or one o'clock, and during the time I was there that day, Ludwig Baur did not leave the premises. There are 3,009 [fol. 240] drums of pure alcohol there in the warehouse now, approximately. Right after the date, October 13th,

1926, I read in the Geneva Daily Times or the Rochester Daily Democrat and Chronicle, and I believe in the Syracuse Post Standard, I read of the seizure of that day. The seizure at Seneca Falls was in those papers at the time it occurred. In October, November and December, 1926, and January and February, 1927, the Waterloo Distilling Corporation had a permit to sell pure grain alcohol.

Respondents rest.

Cross-examination.

By Mr. Templeton:

When the Waterloo sold the Standard Solvents, the charge was $6.00 for each drum shipped. I don't know what the sale price was.

Mr. Templeton: I offer in evidence Certificate of Incorporation of the Bijou Forwarders, Inc.

Mr. Newton: Objected to as incompetent.

The Court: Received.

Mr. Newton: Exception.

(Certificate of Incorporation of Bijou Forwarders, Inc., recorded in office of Secretary of State, Dec. 29, 1926, marked Libellant's Exhibit 87, in Evidence, and read to the jury.)

[fol. 241] LEROY A. WELLER, a witness for libellant, in rebuttal, testified as follows:

Direct examination.

By Mr. Templeton:

I had nothing to do at the Waterloo Distilling Company, during those three days, with the denaturing. I signed the daily reports, which were made and signed by Chamberlain.

DONALD V. MURPHY, a witness in rebuttal for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I was assigned to the Waterloo Distillery, some time in November, and then again some time in December. My

duties were at the bonded warehouse, about four or five hundred feet from the denaturing plant. Hoyt Chamberlain was assigned to the denaturing plant, during the time I was there. I had nothing to do with the denaturing plant while I was there. I had charge of the bonded warehouse, and Chamberlain had charge of the denaturing plant. I had nothing to do with the denaturing plant at any time.

[fol. 242] Cross-examination.

By Mr. Newton:

I had charge of the bonded warehouse, and Chamberlain had charge of the denaturing plant, and the report covers both places, and both signed the report.

JOHN A. McQUADE, a witness for libellant, in rebuttal, testified as follows:

Direct examination.

By Mr. Templeton:

I was assigned to the bonded warehouse and distillery proper. At no time during October, November and December, 1926, was I assigned to the denaturing plant of the Waterloo Distillery, and at no time in October, November and December, 1926, did I assist in supervising the denaturing.

Cross-examination.

By Mr. Newton:

Four different times between October and April 1st, 1927, Mr. Chamberlain and I were both Prohibition Agents, stationed at the Waterloo Plant, and both of us signed those daily reports, showing the amount of alcohol denatured, and in what formula, and how much was shipped, and how [fol. 243] much on hand. During all the time I was there, I never saw any employee of the Waterloo Distillery Company commit any violation of the Prohibition Laws, and no one ever asked or suggested to me, or to any other person that I know of, that they be permitted to violate the laws.

I was over once or twice when the trucks were taking the stuff out. Both of us signed the denaturing plant report. It was intended to cover the blanket operations of both plants.

Redirect examination.

By Mr. Templeton:

At no time during October, November and December, 1926, did I assist in supervising the denaturing.

Robert Takel, a witness for libellant, in rebuttal, testified as follows:

Direct examination.

By Mr. Templeton:

I am employed in the Internal Revenue Department of the Government. I have been assigned to the Waterloo Distillery at Waterloo, since the present Waterloo Distilling Corporation. My assignment, October 1, 1926, was store-[fol. 244] keeper gauger in the denaturing house, and bonded warehouse, and I had been for a period of time prior thereto. I recall seeing Ludwig Baur at the plant for a matter of a couple of weeks before October 9th, which was the last day I was in the denaturing plant. He was there about a week before and I think the week following that. I do not recall if there was any denaturing done in the plant during the week Baur was there. I think there was possibly a couple of Mack trucks there prior to October 9th. After midnight October 9th, until late in the morning, I had the night assignment at the distillery, and we had the keys so as to give them access to the material as they wished it. The Distillery had been operating nights a week or two before that. When working nights in the distillery I would not have access to the denaturing plant. Albert Jackson relieved me there. Jackson had been at the plant, maybe a year.

Mr. Newton: I object to this evidence, as not a proper part of rebuttal.

The Court: Received.

Mr. Newton: Exception.

The pipe line is not used very much. When it was brought on trucks, we knew the number of packages generally, as tickets were sent over for the number of packages, serial numbers, and the gallons.

Mr. Newton: I object to that as part of the affirmative [fol. 245] case. Nothing in the defense that went into that question at all.

The Court: Received.

Mr. Newton: Exception.

It was taken off and we checked for the number of packages and serial numbers and if to be completely denatured, they were dumped and poured into the mixing tank and from the amount the gauge showed of those respective packages, we figured out the amount of denaturants and put them in. When the plant did it, we checked it to see that the denaturants were put in and that the air was turned on, and thoroughly agitated it and then uplocked the valve and let them put it into drums. It was gauged and the proper markings put on the packages. At the plant the marks on the package of C. D. 5 show the serial number, formula and wine gallons, and the Waterloo Distilling Corporation, their stencil on the head of the drum. After being stenciled, it was sometimes stored in the bonded warehouse and sometimes removed from the premises. A part of the denaturing plant was blocked off and bonded for storage where they could store the denatured products if they chose and could remove the completely denatured alcohol at any time they saw fit. It was removed from there sometimes by truck and in a great many cases, carload lots. If removed by trucks, the serial number of the packages were checked if completely denatured alcohol but I would not [fol. 246] necessarily see it placed on the truck. They could not get it out if I was away because the place would be locked. There was a small house erected near the gate of the plant sometimes after October 9th, 1926. A stove, chair and telephone was in it. Nobody was stationed there before I left October 9th. For the 28 years that I was connected with the plant as storekeeper-gauger, there never had been a station of this kind there.

JAMES W. YOST, a witness in rebuttal for libellant, testified as follows:

Direct examination.

By Mr. Templeton:

I was the Government storekeeper-gauger at the Waterloo Distillery in the summer of 1926, assigned from the bonded warehouse to the distillery. I recall that the defendant, Baur, came there sometime in the summer. Some trucks came there practically the same time. I saw the little house that was built at the entrance to the plant. It was simply a square room to house a watchman, who was stationed in there after it was finished, which was along the fore part of October, 1926. Persons approaching the plant did not necessarily have to go by this little house but trucks did. A man named Sessler was assigned to the little house. I think his hours were from seven in the morning until five [fol. 247] at night. He never accosted me. There was a telephone there. They put telephones all over the plant. I do not think they were there prior to October. I could not say whether this was before or after the defendant Baur came there.

I recall when the change in the assignment came and I spoke to Jackson about it. He said he did not want the change. The next night he said he had seen his Congressman and he told Jackson to take the position. Jackson later told me everything was going all right, that he was leaving everything to Chamberlain. I recall seeing Mr. Fingerhood and talking to him. I asked Mr. Fingerhood who was the strange man who was standing nearby, and he said he was the owner of the trucks which had just arrived. I would not recognize that man now.

(Mr. Templeton shows Exhibit- 27 and 53 to the Jury.)

Mr. Newton: Respondents move to strike from the evidence all the exhibits as to all shipments and seizures, and the evidence pertaining to those shipments and seizures, upon the ground that they are not connected in such a way as to be competent evidence on the respondents.

The Court: Motion denied.

Mr. Newton: Exception.

[fol. 248] MOTION TO DISMISS

I renew all the motions made at the close of the Government's case, and hereby state all those motions again as a ground for the ruling asked in each one of them at the close of the Government's case.

The Court: Denied.

Mr. Newton: Exception.

It is stipulated that Count 3, stating the cause of forfeiture, in the libel, be dismissed.

Evidence closed.

[fol. 249] CHARGE OF THE COURT

GENTLEMEN: This is a civil action, in which you will shortly be called upon to render your verdict, and not a criminal action.

I will take this opportunity, this early in the charge, to say to you that the questions of law involved, I will now charge you. Those questions of law, you are to take as the Court gives them to you. The questions of fact in the case are solely for your determination, as you are the sole judges of the facts; and later on in the charge, I will indicate to you, as far as the law permits me to do so, just what those facts are that you are to pass upon.

Before going into that, I will discuss the questions of law involved. I may say here, too, that when I do come to talk about the questions of fact in the case, in these United States Courts, the Judge is privileged to discuss the facts, and even go to the extent of expressing his opinion as to the facts, if he prefaces that discussion with a statement to you gentlemen that you are not bound, so far as the facts are concerned, by the opinion of the Judge, as you are the sole judges of the facts; although you are, of course, bound by the statement of the law as the Court states the law to you.

I have said that this is a civil action. It is what is known [fol. 250] in law as an action in rem, that is, it is an action against property. It is not a lawsuit against any persons; there are no persons who are defendants in this case. The action is brought by the Government, and under a form

known as a libel, technically, and it is brought against certain property. Such individuals as appear in the case are those who make a claim to this property, and they have a right to come in and say, as they have said in this case, that they believe that the Government has no claim against the property, or has not the claim against the property that they say that they think they have in the libel.

So that you are not to take it at all that there are any defendants here. The property itself responds to the libel of the Government. I will go into that a little bit more in detail so that you will understand a little more clearly just what this form of action means.

The Statutes of the United States say that, under certain circumstances, property can do wrong, and in this case the claim of the Government is that, under two of the statutes of the United States, which are Internal Revenue Statutes, this particular property, which has been known as the property of the Waterloo Distilling Company, has been used in an attempt to defraud the Government. If it is decided by [fol. 251] your verdict that this property has been used by some persons, naturally, by the persons in control of it, in an attempt to defraud the Government, then the Statutes of the United States say the property itself is forfeited to the Government; and that is the nature of this proceeding, the claim of the Government being, in the libel, that this property of the Waterloo Distilling Company has been used by certain persons to defraud the Government, or in an attempt to defraud the Government, in violation of the Statutes of the United States, and therefore, this property is forfeited to the Government. So that your verdict, when it comes in, will be Yes or No, as to whether this property was used in an attempt to defraud the United States.

That is, in general, the character of the action, and the character of your verdict. I will, of course, go into the statute a little more in detail, so that you will understand more particularly what the claim of the Government is.

The libel, which is the paper filed by the United States in this suit, and which corresponds to a complaint in an ordinary civil case, sets up two different counts or charges, Count One and Count Two, and your verdict will be Yes or No as to Count One, and Yes or No as to Count Two.

Count One is based upon a statute of the United States, [fol. 252] which I will briefly explain to you. Count Two I

will also explain to you, and that is based upon a different statute of the United States.

Both of these statutes, the one covered by Count One and the one covered by Count Two, have to do with distilleries, and Count One provides that any person who carries on the business of a distillery, without having given bond as required by law, or who shall engage in or carry on the business of a distillery with intent to defraud the United States of a tax on the spirits distilled by them, shall be guilty of a certain offense, shall be subjected to a certain penalty; and it further says that all of the distilled spirits and wines, and all of the other apparatus connected with the distillery, and the buildings themselves, and the property on which the buildings stand, and, in fact, everything connected with the distillery, the real estate, buildings, shall be forfeited to the United States in case it is proved that the business was being carried on with intent to defraud the United States.

That is the first count. That provides that, in case fraud is committed on the United States in the operation of a distillery, then the buildings, grounds, and everything in the buildings, is forfeited to the United States; and this proceeding is, as I have stated before a proceeding at law to compel that forfeiture, on the ground that a fraud was [fol. 253] committed against the United States under that Statute. That is the First Count.

The Government, in this particular libel, has added another Count, which sets up another penalty, under similar circumstances. That Statute, which is a different section of the law, provides that whenever a person engaged in carrying on the business of a distiller, defrauds or attempts to defraud the United States of the tax on spirits distilled by them, or any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits, and all raw materials for the production of distilled spirits, found in the distillery and on the distillery's premises. There is a little difference in the language of these two sections, and it is probably for that reason, both of them are set forth in this libel or complaint.

In the first section, which is under Count One, there is provision for the forfeiture, not only of the buildings, and the contents of the buildings, and everything used in connection with the business, but also for the forfeiture of the

real estate. In the Second Count, and the other section, there is provision for the forfeiture of the distillery, and the distillery apparatus, and the spirits distilled by them, which are found on the premises, but there is no provision in that section for the forfeiture of the real estate.

[fol. 254] It is not really necessary for me to give you the construction of the sections to the extent of explaining to you why that difference is made in these two sections. I might make this suggestion with reference to it, which I think is entirely within the law. It is this: In the section which provides for the forfeiture of the real estate, as well as the contents of the buildings, it is provided that that shall apply to a case of a distiller who has not given the bond required by law; so that applies, in one case, to a distillery which is not legally operated, a wildcat distillery. There, the penalty is for giving up the real estate. That does not apply at all in the case that we have under consideration, because in this case the distillery in question was operating under a permit of the Government, so that that part of the section which says that it applies to a distiller who is operating without giving the bond required by law, does not apply in our case; but this part of that section does apply in the case here, if it is made applicable by the fact: "Or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax."

That apparently means that any distiller, whether he is operating legally or not, if he carries on his business, if he is carrying on his business with intent to defraud the Gov-

[fol. 255] ernment, then he comes within this section, which provides for the forfeiture of not only the buildings and the apparatus, but of the land itself.

Now, in the other case which you will also have to pass on, the provision is that any person who engages in the business of a distiller, if he defrauds, or attempts to defraud the United States of the tax on spirits, then he shall forfeit the distillery and distillery apparatus, and the materials; and I would say that the difference between the two sections is that, in Section 1, it may be simply a single misstep, or a single case of a diversion, or a single case of fraud, or an attempt to defraud the Government, while in the other case, in the section which provides for the forfeiture of the real estate, the language is somewhat broader,

and in that case, the person who forfeits, or the property which is forfeited there, will be in a case where there is a course of business, where the person is engaged in or carries on the business with the intent to defraud the Government.

I do not know that I have made that perfectly clear, but you will have to pass on Count One and on Count Two. When you pass on Count One, you will pass upon the Count which provides that any person carrying on the business of a distillery, carrying it on with the intent to defraud the Government, forfeits the buildings, and the grounds, if you find that he did intend to carry on the business with the [fol. 256] intent to defraud the Government. In the other case, in Count Two, if you find that there is simply a defrauding of the Government in one single particular, whether the business was carried on with that intent or not, then, in that case, it may be simply a single, almost accidental case, if the Government was actually defrauded from the payment of tax on any of the spirits involved, then the distillery would be forfeited; although in that case, it would not carry with it the forfeiture of the real estate.

There is one other point, in connection with the construction of this law, that I must call your attention to, in order for you to find that this distillery is forfeited, and that is what the effect of your verdict will be, that it is or is not forfeited to the Government: in order for you to find that it is forfeited to the Government, it is not necessary for you to find, as a matter of fact, that the Government was actually defrauded of the tax. If the distillery, or the persons operating the distillery, attempted to defraud the Government, or carry on the business of the distillery with the intention of defrauding the Government, and make an attempt to do it, even if that attempt is not consummated, then they have violated the law to the extent that the distillery is forfeited to the Government.

[fol. 257] Briefly stated, the attempt to defraud must not necessarily be consummated to make the distillery guilty, but if the attempt is made, with the intent to defraud, then the distillery is forfeited to the Government.

I stated to you at the beginning of the charge that this is not a criminal action, but is a civil action. That fact necessitates my calling your attention to this rule of law, that

the degree of proof required for you to arrive at your decision is not the same in a civil action as it is in a criminal action. Many of you gentlemen who have been on other cases during this term of court, were sitting in criminal cases. In those cases, I charged you very particularly on the question of "beyond a reasonable doubt". In a criminal case, the Government sustains the burden of proof, and must prove the case beyond a reasonable doubt. That rule does not apply in civil cases, such as this one. In civil cases, the Government must sustain the burden of proof, but sustain it only by a fair preponderance of the evidence. I think you will appreciate the difference in terms. A fair preponderance of the evidence means that they must sustain the case by the balance of the evidence being in their favor. In a criminal proceding, they must sustain it beyond a reasonable doubt. That rule does not apply in this case. [fol. 258] There are a few other general principles of law that I will call your attention to. You are the judges of the facts, and as judges of the facts, you are the sole judges of the credibility of the witnesses, and it is for you to say whether the witnesses who appeared before you are to be believed or not, and how much of what they testified to is to be believed. That rule is made a little difficult in this case, because we have had a great deal of testimony read from the record, and you have not seen the witnesses before you, so that you must judge of the credibility of that testimony as your best judgment inclines you to do.

I will now take up this question of what you have to decide, referring to some extent to the facts in the case. As you have gathered from what I have already said, the questions you have to answer are only two: One referring to Count One, and one referring to Count Two. The question is, was this distillery used to defraud the Government, and the answer is, Yes or No.

Under the Statute, the Government is defrauded when distilled spirits are put onto the market without the payment of tax to the Government. In this case, the Waterloo Distilling Company had a permit to distill spirits, and also to denature them, and put them on the market in certain forms. The kind that we have been hearing most about are [fol. 259] what is known as C. D. 5, or completely denatured alcohol, and S. D. 40, or specially denatured alcohol. The Waterloo Distilling Company had a right to make both of

those kinds of alcohol, and to put them on the market; and they had permits from the Government which gave them the right to do so.

When they sold completely denatured alcohol, they could sell that to anyone who was in the market for it. Completely denatured alcohol is the kind of alcohol that we use in our automobile radiators. It cannot, according to the testimony that was given by the chemist here, be easily cleaned; that is, it cannot be redistilled very easily, so that it could possibly be used for beverage purposes. There is some question whether it might not, by a very complete system of continual distillation, be cleaned so that it could be used for beverage purposes, but that would be pretty expensive, and it is rarely done, so that they can sell the completely denatured alcohol to everybody.

Under the testimony here, it appears that during the three months in question, which are the three months during which the Government charges that alcohol was diverted, the Waterloo Company reported to the Government that they made only completely denatured alcohol, C. D. 5. All their report slips that went in to the Government showed [fol. 260] that during those three months nothing was made in the plant, or denatured in the plant, excepting this completely denatured alcohol. I believe that is correct, is it not?

Mr. Templeton: Yes.

The Court: So that, if all that went out of the plant was completely denatured alcohol, there would be no question but that the distillery was carrying on its business in a perfectly legal and legitimate way. It appears from the testimony, too, that a certain concern down on Long Island had a permit to purchase from the Waterloo Distillery, some specially denatured alcohol, S. D. 40. This S. D. 40, you will remember from the testimony, is alcohol which is used in the arts, it is used in the manufacture of perfumes, and in the manufacture of toilet articles. This S. D. 40 is not denatured to the extent that the completely denatured is. It has only enough denaturant put into it to make it disagreeable to the taste, and not easy to use as a beverage, or for making a beverage. You will recall that the witness, the chemist, testified that a process of distillation of the S. D. 40 takes out of it most of the denaturing ingredients

that are put in there to denature it. That is, a single distillation of the S. D. 40 will pretty nearly clean it out, although not entirely.

So that, in this case, it is the contention of the Govern-
[fol. 261] ment, in order to sustain the libel, that this plant was used for the putting out, illegally, of this specially denatured alcohol, which was easily cleaned, which specially denatured alcohol was diverted from the legitimate channels; that is, for sale in the manufacture of toilet articles and things of that sort, into illegitimate channels, that is, for the making of a beverage.

The law is that, if a distillery puts out an article in the form of distilled spirits for use in the manufacture of anything for beverage purposes, then that article which it puts out is liable to a tax by the Government, and if that tax is not paid by the distillery which puts out this article which was used for the manufacture of something for beverage purposes, or for beverage purposes itself, then the distillery has committed fraud upon the Government, and the distillery is forfeited under these sections. So that, in order to find for the Government in this case, you must find from the facts that have been presented here, that this distillery, or the people controlling it, put out from their plant alcohol which was used, or which was intended to be used for the manufacture of something for beverage purposes.

In arriving at your conclusion on that point, I call your attention to the fact that there is no direct evidence in this case that any particular bit of this alcohol that went out of
[fol. 262] that plant, was diverted to some particular place, and at that particular place used for beverage purposes. In order that you might come to a conclusion that it was done, it is not necessary that there should be that direct evidence. You are permitted to draw the conclusion, if you think that it can properly be drawn from the circumstances in the case, or what is commonly called circumstantial evidence, that it was the intention of the people operating this distillery to divert into illegal channels the alcohol that they were putting out, and that those illegal channels lead to its being used for beverage purposes. Facts may be proved by circumstantial evidence; that is, by proof of circumstances, if any, such as give rise to a reasonable inference in the minds of the Jury of the truth of the facts alleged and sought to be proved. Circumstantial evidence,

when strong and convincing, is the satisfactory evidence from which to draw conclusions of the existence or non-existence of a disputed fact.

We are now back to the main proposition: You are to determine whether or not this distillery, or the people operating the distillery were attempting to commit a fraud on the Government. As I said before, your answer to that will be Yes or No. The fraud on the Government which it [fol. 263] is claimed they attempted to commit, and which it is claimed was being committed, was the putting out from the distillery of distilled spirits which were intended to be used for beverage purposes. So that, in order to find for the Government in this case, you must find that the distillery did put out alcohol, intending that that alcohol shall be used for an illegitimate purpose, and for beverage purposes; and if you find that the distillery did divert its alcohol from its legitimate business, and did convey it into channels in which it would be used for beverage purposes, then you have found that the distillery has sent out from its plant distilled spirits which were subjected to a tax by the Government, which was not paid; and in that case, of course, under the law, the distillery is forfeited.

I do not want to take the time to go through all of the evidence in the case. The evidence has been pretty well summed up by the Counsel on both sides. I am sure that, as the evidence was being presented, it must have been very confusing to you. A great deal of it was read from the previous records, and that part which was given by the witnesses was not given in such consecutive form that it was easy for anyone to follow it, even though they were more familiar with the history of the case than you must have been; but the claim of the Government is that they [fol. 264] have presented to you testimony that there was a scheme, or plan, on the part of the owners of this distillery, which was developed through the control or ownership of different companies and corporations in the surrounding territory, to divert alcohol from its legitimate course. They say that they have presented evidence to you that, on certain specific occasions, on one occasion at Cayuga, New York, that there was two carloads of drums of alcohol seized there by the Government which were, according to the evidence which they insist upon, drawn to that point in trucks whch were used for conveying alco-

hol from this particular distillery. They called your attention to the fact that this point of shipment was within a short distance of the distillery, and that, and all of the other circumstances in connection with this seizure, you will take into consideration in coming to your conclusion as to whether, on this particular occasion, the alcohol seized in that railroad car came from the Waterloo Distillery.

The evidence is that the samples from it showed that it was specially denatured alcohol 40, and if you were to conclude from your consideration of the case—and, as to that, you are the judges of the facts—that it did come from the Waterloo Distillery, you have a right to draw your own conclusions as to whether it was intended to be used ulti- [fol. 265] mately for beverage purposes in some place. They have also called your attention to certain shipments made from Seneca Falls, another nearby place, where some of the carloads were seized, and it was found in that case that the drums contained specially denatured alcohol 40.

They called your attention also to another shipment sent to Geneva, another nearby town. They have also introduced evidence of a large number of shipments which were sent from Syracuse, and the evidence they present to you is that, on the days on which these shipments went out of Syracuse, shipments of exactly the same size went out of the Waterloo Distilling Company plant; and the testimony that they present to you for your consideration is that the shipping orders or way-bills were presented at the freight office by the man who had charge of the deliveries from the Waterloo Distilling Company plant.

You will remember that some of those shipments were followed to Chicago, where the contents of the drums were analyzed, and found to be this specially denatured alcohol 40.

The respondents—and by the respondents, I mean the persons who are responsible for the carrying on of the distillery—state that there is no proof that they were responsible for any of these shipments; that they were conducting the business under permit of the Government; that [fol. 266] at no time did they make in their plant any of this specially denatured alcohol 40, during those three months; that during all that time there were agents in residence at the plant, who had charge of the keys which locked up the denaturants which were used in denaturing; and

that it would have been impossible for them to have made this specially denatured 40 without the Government knowing about it; and that, therefore, their contention is that if these shipments from these different places took place as it was alleged, that they must have come from some other source, and did not come from them.

That evidence presents to you the nature of your duty in determining the fact. It is for you to say whether or not this plant was responsible for all of these shipments of this specially denatured 40, that it was testified to, were actually sent out at certain times and places. If you say that they did come from this Waterloo plant, you say that all of the evidence in the case, taken together, leads you inevitably to the conclusion that they did come from that plant, then you must also go a step further, and before you render your verdict, arrive at the conclusion that under all the circumstances, this particular S. D. 40 was diverted from its natural course into what are commonly called bootleg channels; and whether that is true or not, of course, you [fol. 267] must arrive at a result based upon all of the circumstances of the case, which you consider to be what would naturally occur under those circumstances. In other words, that is one of the things in which you must exercise your judgment, based upon all of the evidence in the case.

So that the whole business narrows down to this: After you have considered the evidence, and arrived at some conclusion, you come back and say, as to Count One, you find either for the Government or for the respondents; as to Count Two, you find for the Government or for the respondents. By reporting in that way, you say, as I have endeavored to make clear to you before, if you say you find for the Government, you find that this particular distillery carried on its business with intent to defraud the Government, and by defrauding the Government, it means that they put out from their distillery a product which could be used, intended to be used for the making of a beverage, and that product, as it was subject to tax, is a fraud on the Government.

If you say you find for the respondents, you determine that this distillery did not do that thing, did not carry on its business with intent to defraud the Government, and did not do anything in any way unlawful; and you make that answer for the Government or for the respondents as

[fol. 268] to Count One, or Count Two, both of which I have endeavored, as well as I could, to explain to you.

Any requests? Anything from the Government?

REQUESTS TO CHARGE

Mr. Templeton: I would ask the Court to charge the jury that specially denatured alcohol No. 40 must be shipped pursuant to permit, and to persons holding permits to purchase, and such shipment must be reported to the Government.

The Court: Gentlemen, I believe that was the testimony, that specially denatured alcohol 40 may be shipped only to persons who have permits to purchase, and reports made to the Government.

Mr. Templeton: I ask the Court to charge the jury that if specially denatured alcohol No. 40 is denatured, it must be so reported to the Government as having been denatured.

The Court: That is in the evidence, is it?

Mr. Templeton: Well, that is the law.

The Court: That is the law?

Mr. Templeton: That is the regulation.

The Court: Well, if specially denatured alcohol 40 is denatured in the plant, that is, if they make any specially denatured alcohol No. 40, S. D. 40, in the plant, a report of that making of specially denatured alcohol 40 must be made to the Government, when it is made. As a matter [fol. 269] of fact, I take it that each kind of denaturing must be reported to the Government, just as it is made.

Mr. Templeton: Yes. I ask the Court to charge the jury that, in coming to their conclusions with reference to this trial, that they may take into consideration the fact that the respondents have not produced for examination in this case, Charles H. Fingerhood, Hoyt Chamberlain, R. Beck, J. Beck, Lagier.

The Court: I think I will charge you, Gentlemen, that you must come to your conclusion from all of the evidence as it is presented to you in this case, and from your using your best judgment with reference to it.

Mr. Newton: I except to the requests as made by the District Attorney, and as the Court charged thereafter; and I ask your Honor to instruct the jury that where witnesses are equally as available to one side as the other, and neither side produces them, that no presumption is to be indulged in by the jury that their evidence is favorable one way or the other.

The Court: I will so charge.

Mr. Newton: I ask your Honor to charge that failure to report to the Government the manufacture of specially denatured alcohol 40 or C. D. 5, is not, of itself a ground for forfeiture under the libel.

The Court: Gentlemen, I have explained to you, I think, [fol. 270] fully, just what the libel means. Counsel has asked me to charge you that failure to report the manufacture of S. D. 40 is not forfeiture under the libel. That fact alone would not be forfeiture under the libel, because forfeiture involves the entire proceeding of the intent to defraud the United States, and actually making an attempt to defraud the United States. Whether or not the failure to report the making of S. D. 40 would have anything to do with that, would depend on the entire case. That one instance alone, if that were the only thing in the case, probably would not render the distillery liable to forfeiture.

Mr. Newton: I except to that part of your Honor's charge in which you state, in substance, if the distillery puts out an article for beverage purposes, alcohol which was used or intended to be used for manufacture of beverages, or for beverage purposes, without paying the tax—I am putting that on—upon the ground that that does not apply to C. D. 5, completely denatured alcohol, because completely denatured alcohol can be sold to anybody.

The Court: Well, I will let the charge stand as I stated it before. Refused, except as charged.

Mr. Newton: Exception.

The Court: It is simply an exception, anyway. It is not a request to charge.

Mr. Newton: Yes. I request your Honor to charge that [fol. 271] C. D. 5 is tax exempt, and can be sold to anybody, and not be subject to any forfeiture under libel, that is, the plant selling it.

The Court: Gentlemen, the Counsel has requested me to charge you that completely denatured alcohol No. 5 may be sold to anybody. While that is a fact, it does not affect in any degree, or in any way, the charge that I gave you. If C. D. 5, even, were diverted into channels, by the distillery, through which it was cleaned and used for beverage purposes, then, in that case, C. D. 5 itself would be liable to tax, and would render forfeiture liable.

I explain that in that way in order that you may not be confused by the statement, which is a fact, that C. D. 5 itself, in that form, is not liable to tax.

Mr. Newton: I except to your Honor's charge.

I ask your Honor to charge the jury that there is no claim in this case by the Government, under the libel, that the respondents diverted C. D. 5 alcohol in any way for the purpose of defrauding the Government, or attempting to defraud the Government.

The Court: The libel itself is in general language, that the respondent, that is, the distillery was carried on with intent to defraud the Government, and the libel itself does not contain anything with reference to C. D. 5, or with [fol. 272] reference to any particular kind of alcohol, nor was it necessary that it should. The libel itself is in the general language of the Statute, that the business was carried on with the intent to defraud the Government.

Mr. Newton: I except to your Honor's charge upon the ground that Count One for the forfeiture is based upon the allegation that specially denatured No. 40 was diverted for that purpose; and that Count No. Two for forfeiture especially states in it that it was the diversion of specially denatured No. 40 for the purposes——

The Court: Just a moment until I check up on that.

Mr. Newton: Not specially denatured 40, but distilled spirits, instead of using the words "specially denatured 40".

The Court: Well, that is not what you said before, and I do not find that.

Mr. Newton: Well, I mean, spirits; it means, distilled spirits, and that distilled spirits——

The Court: On what page is that? The bottom of page 4?

Mr. Newton: Well, it says "large quantities"; it speaks of "as described in Schedule 'A' ", "quantities of alcohol included in alcohol described in Schedule 'A' " heretofore referred to, ostensibly for non-beverage purposes, but in fact, for beverage purposes.

The Court: Yes, I have found that.

[fol. 273] Mr. Newton: I ask your Honor to charge the jury that specially denatured alcohol is not potable, and is tax free, and cannot be the basis for forfeiture, the sale of it, itself, by the distillery, providing it is sold under permit to the permittee.

The Court: I will charge you, Gentlemen, with reference to specially denatured alcohol 40, that if it is sold in the regular way, if it is made under permit and sold to persons who are entitled to purchase it, that it is tax free; and if it is sold in that way, of course, the distillery who sells it, has not violated the law in any way.

Mr. Newton: I ask your Honor to charge that completely denatured alcohol is not potable, and cannot be made potable, as a matter of law, under the testimony in this case.

The Court: Refused.

Mr. Newton: Exception.

The Court: I refused that request in whole. In part, it is true. It is not potable, but I do refuse that part of the request which says that as a matter of law it cannot be made potable.

Mr. Newton: Exception.

I ask your Honor to charge the jury that specially denatured alcohol No. 40 and completely denatured alcohol No. 5 are not distilled spirits under the revenue acts and the libel charged in this case.

The Court: Refused, except as charged.

[fol. 274] Mr. Newton: Exception.

I ask your Honor to charge the jury that fraud can never be presumed, but must be established by clear, unequivocal and convincing evidence.

The Court: I will charge the jury that fraud cannot be presumed, and must be established by legal evidence.

Mr. Newton: Exception.

I ask the Court to charge the jury that fraud is never to be presumed, but must be established by clear, unequivocal and convincing evidence, but circumstantial evidence, with proper inferences to be fairly drawn therefrom, may be sufficient to establish fraud, but it is not to be lightly inferred, and must be established by clear and convincing evidence.

The Court: I will so charge.

Mr. Newton: I ask your Honor to charge the jury that the respondents are not bound by what the purchasers of completely denatured alcohol do, after purchasing it from the respondents.

The Court: Gentlemen, the distillery, or the plant which sells completely denatured alcohol, is not bound by what happened to it after the completely denatured alcohol is sold, if it is sold in the regular, legal course of business.

Mr. Newton: I ask your Honor to charge the jury that circumstances, though suspicious, and even highly suspicious, can not be regarded as taking the place of proof.

The Court: The Court states that he has charged the [fol. 275] jury what he considers to be fully, with reference to circumstantial evidence, so he refuses that, except as charged.

Mr. Newton: Exception. That is all, your Honor.

The Court: Anything further.

Mr. Newton: It is stipulated that the jury may take the exhibits of the respective parties.

(Jury retire at 5:10 P. M.)

VERDICT

(Jury return into Court at 6:30 P. M. and render verdict in favor of the libellant and against the respondents on Counts One and Two of the Libel, as defined by the Court in his charge.)

Proceedings December 21, 1928, 10 A. M.

Appearances: Richard H. Templeton, Esq., for libellant; Thomas L. Newton, Esq., for respondents.

Mr. Newton: If the Court please, respondents ask that on the verdict of the jury the Court direct that it be incorporated as part of the proposed decree to be entered in the proceeding that the libel of all real property outside of the bonded premises, except the part outside of said [fol. 276] bonded premises, if any, as was used by the Waterloo Distilling Corporation for purposes of ingress and egress to the bonded premises, and also the part outside of the bonded premises in which the trucks were stored, and the lands used for purposes of ingress and egress to such garage to other parts of the bonded premises, be dismissed.

The Court: Denied.

Mr. Newton: Exception.

MOTION TO SET ASIDE VERDICT

Respondents move to set aside the verdict of the jury and for a new trial upon all the exceptions in the case, and upon the ground that the verdict of the jury is contrary to law and against the weight of evidence.

The Court: Denied.

Mr. Newton: Exception.

Mr. Newton: Respondents ask a stay of proceedings and that the term of Court be continued for the period of thirty days for respondents to make and file their assignment of errors and to make and have allowed and filed their bill of exceptions.

The Court: Granted.

[fol. 277] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION SETTLING BILL OF EXCEPTIONS

It is hereby stipulated by and between the attorneys for [fol. 278] the respective parties that the foregoing Bill of Exceptions contains all the evidence produced or given upon the trial of this action, and the same may be allowed and settled.

Dated June 29th, 1929.

Richard H. Templeton, United States Dist. Atty.
Lewis Landes and Thos. L. Newton, Attorneys for Libellees.

[fol. 279] In United States District Court

[Title omitted]

Stipulations as to Exhibits

It is hereby stipulated between the parties hereto, by their respective attorneys, that the foregoing is a true [fol. 280] transcript of the record upon review in the above entitled cause upon the appeal taken herein by the libellees-appellants; that the foregoing record does not contain all of the exhibits used on the trial of the issues in the District Court, as the same were there read and shown to the jury, and that any of such exhibits either party may desire to add to the record may be added thereto but to be prepared at the expense of the libellees-appellants.

Dated June 29th, 1929.

Richard H. Templeton, United States Attorney.
Lewis Landes and Thos. L. Newton, Attorneys for Libellees-Appellants.

[fol. 281] In United States District Court

[Title omitted]

Order Settling Bill of Exceptions

Upon reading and filing the annexed stipulation on the [fol. 282] part of Richard H. Templeton, United States Attorney, for the Western District of New York, and Lewis Landes and Thomas L. Newton, attorneys for the libellees, and for as much as the foregoing matters and things do not fully appear of record, the libellees tender this, their Bill of Exceptions by them reserved herein, and pray that the same may be allowed, signed and sealed by a Judge of this Court, and filed and made a part of the record in this case, which is accordingly done this 11th day of July, 1929.

Simon L. Adler, District Judge.

[fols. 283-285] Citation, in usual form, omitted in printing.

[fol. 286] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAYER FOR REVERSAL

[fol. 287] Now comes The Waterloo Distilling Corporation, The Seneca Solvents & Chemical Corporation, Max Rein and Fannie Rein, respondents, and pray for a reversal of the judgment of the United States District Court herein, for the Western District of New York, entered in the office of the Clerk thereof, on the 31st day of January, 1929.

Lewis Landes, Attorney for Respondents, Office & P. O. address: No. 233 Broadway, New York City, and Thomas L. Newton, Attorney for Respondents, No. 601 Wallbridge Bldg., Buffalo, New York.

[fol. 288] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

[fol. 289] Now comes the defendants Waterloo Distilling Corporation, The Seneca & Chemical Corporation, Max Rein and Fannie Rein, and make and file this Assignment of Error.

1. That the verdict rendered by the jury is against the clear weight of evidence.

2. That the verdict rendered by the jury is contrary to law.

3. The Court erred in charging over defendants' exception, substantially:

"Gentlemen, I believe that was the testimony, that specially denatured alcohol 40 may be shipped only to persons who have permits to purchase, and reports made to the Government."

4. The Court erred in charging over defendant's exception, substantially:

"Well, if specially denatured alcohol 40 is denatured in the plant, that is, if they make any specially denatured alcohol No. 40, S. D. 40 in the plant, a report of that making of specially denatured alcohol 40 must be made to the Government, when it is made. As a matter of fact, I take it that each kind of denaturing must be reported to the Government, just as it is made."

5. The Court erred in charging over the defendants' exception, substantially:

[fol. 290] "I think I will charge you, Gentlemen, that you must come to your conclusion from all of the evidence as it is presented to you in this case, and from your using your best judgment with reference to it."

6. The Court erred in refusing to charge the jury at the defendants' request as follows:

"I request your Honor to charge that C. D. 5 is tax exempt, and can be sold to anybody, and not be subject to any forfeiture under the libel, that is, the plant selling it."

7. The Court erred in charging over the defendants' exception, substantially:

"Gentlemen, the Counsel has requested me to charge you that completely denatured alcohol No. 5 may be sold to anybody. While that is a fact, it does not affect in any degree, or in any way, the charge that I gave you. If C. D. 5, even, were diverted into channels, by the distillery, through which it was cleaned and used for beverage purposes, then, in that case C. D. 5 itself would be liable to tax, and would render forfeiture liable.

I explain that in that way in order that you may not be confused by the statement, which is a fact, that C. D. 5 itself, in that form, is not liable to tax."

8. The Court erred in charging over the defendants' ex-
[fol. 291] ception, substantially as follows:

"The libel itself is in general language, that the respondent, that is, the distillery was carried on with intent to defraud the Government, and the libel itself does not contain anything with reference to C. D. 5, or with reference to any particular kind of alcohol, nor was it necessary that it

should. The libel itself is in the general language of the statute, that the business was carried on with the intent to defraud the Government."

9. The Court erred in refusing to charge the jury at respondent's request as follows:

"I ask your Honor to charge that completely denatured alcohol is not potable, and cannot be made potable, as a matter of law, under the testimony in this case."

10. The Court erred in refusing to charge the jury at respondent's request as follows:

"I ask your Honor to charge the jury that specially denatured alcohol No. 40 and completely denatured alcohol No. 5, are not distilled spirits under the revenue acts and the libel charged in this case."

11. The Court erred in refusing to charge the jury at respondent's request as follows:

"I ask your Honor to charge the jury that fraud can [fol. 292] never be presumed, but must be established by clear, unequivocal and convincing evidence."

12. The Court erred in refusing to charge the jury at respondent's request as follows:

"I ask your Honor to charge the jury that circumstances, though suspicious, and even highly suspicious, cannot be regarded as taking the place of proof."

13. The Court erred in denying the respondent's motion that the libel be dismissed upon the ground that the Government having elected to proceed to try the defendants in the criminal proceeding for violations of the provisions of the National Prohibition Act were barred from now proceeding under the Internal Revenue Laws.

14. The Court erred in receiving in evidence Libellant's Exhibit No. 24.

15. The Court erred in permitting the libellant's witness Michael C. Kebeny to testify as to what happened to the permit referring to Exhibit 24 on March 17, 1927.

16. The Court erred in receiving in evidence Libellant's Exhibit No. 25.

17. The Court erred in refusing to strike out the evidence of the Libellant's witness Grover L. Higgins.

18. The Court erred in receiving in evidence Libellant's [fol. 293] Exhibit No. 26.

19. The Court erred in permitting the libellant's witness Daniel F. Sheehan to testify as to conversations had with Charles H. Fingerhood several months after the seizure by the sheriff of carloads of drums of alcohol at Cayuga.

20. The Court erred in permitting the libellant's witness Daniel F. Sheehan to testify as to the number of times he saw Mueller.

21. The Court erred in refusing to strike out all the evidence of the libellant's witness Daniel F. Sheehan, which in any way pertains to Mueller or to anything Mueller did.

22. The Court erred in permitting the Government's witness Dwight E. Avis to testify as to exhibits for identification 31, 32, 33, 34, 35 and 36.

23. The Court erred in receiving in evidence Libellant's Exhibits Nos. 31, 32, 33, 34, 35 and 36.

24. The Court erred in receiving in evidence Libellant's Exhibits 37, 38 and 39.

25. The Court erred in receiving in evidence Libellant's Exhibit No. 40.

26. The Court erred in receiving in evidence Libellant's Exhibit No. 41.

[fol. 294] 27. The Court erred in permitting the libellant's witness Percy W. Darby to testify over the respondent's objection in relation to the signature of Libellant's Exhibits 12, 41, 9, 10 and 11.

28. The Court erred in permitting the libellant's witness Percy W. Darby to testify as to the handwriting on Libellant's Exhibits Nos. 25 and 26 for Identification.

29. The Court erred in receiving in evidence Libellant's Exhibit No. 26.

30. The Court erred in permitting the libellant's witness Percy W. Darby to testify as to the signature of "R. Beck" on Libellant's Exhibit No. 25.

31. The Court erred in permitting libellant's witness Percy W. Darby to testify that the hand that wrote Standard Solvents Chemical Corporation and R. Beck is a disguised hand.

31. The Court erred in permitting the libellant's witness Percy W. Darby to testify that the hand that wrote the signature "Ludwig Bauer" and "R. Beck" on the exhibit was the same hand that wrote the signature "John Mueller".

32. The Court erred in receiving in evidence Libellant's Exhibit No. 27.

33. The Court erred in permitting the libellant's wit- [fol. 295] ness Percy W. Darby to testify that the hand that wrote "Ludwig Bauer" on the various exhibits was the same hand that wrote "John Mueller" on Exhibit 53 for Identification.

34. The Court erred in receiving in evidence Libellant's Exhibit 53.

35. The Court erred in permitting the witness Percy W. Darby to testify that the man who was pointed out as Ludwig Bauer signed the name John Mueller on Libellant's Exhibit 53.

36. The Court erred in permitting the libellant's witness Percy W. Darby to testify that the hand that wrote the signature at the lower right hand corner of Libellant's Exhibit 44 was signed by the same hand that wrote the signature in the lower left hand corner.

37. The Court erred in permitting the libellant's witness Percy W. Darby to testify that the signature on the lower right hand corner of Libellant's Exhibit 46 and the signature on the lower left hand corner were written by the same hand.

38. The Court erred in permitting the libellant's witness Percy W. Darby to testify that the hand that wrote the signature at the lower right hand corner of Libellant's Exhibit 47 was written by the same hand that wrote the signature in the lower left hand corner.

39. The Court erred in permitting the libellant's witness [fol. 296] Percy W. Darby to testify that the hand that wrote the signature in the lower left hand corner of Libellant's Exhibit 52 for Identification was written by the same hand that wrote the signature in the lower left hand corner of Libellant's Exhibits 45 and 44 and also as to the same signatures in the lower left hand corner as wrote Libellant's Exhibits 46 and 47 as being identical with the signature of the person who wrote in the lower left hand corner of Exhibit 52 for Identification.

40. The Court erred in receiving in evidence Libellant's Exhibit 52.

41. The Court erred in permitting the libellant's attorney to read to the jury a small portion of Libellant's Exhibit 52.

42. The Court erred in permitting libellant's witness Jeremiah J. Green to testify that on investigation he found the contents of the Illinois Central Car 330216 and a Reading Car 16297.

43. The Court erred in permitting the libellant's witness Jeremiah J. Green to testify in relation to his examination of Illinois Central Car 330216 in the Government's Warehouse in Chicago in October, 1926, and also Reading Car 16297.

44. The Court erred in receiving in evidence Libellant's Exhibit No. 64.

45. The Court erred in refusing to strike out all the tes- [fol. 297] timony of libellant's witness James A. Connelly.

46. The Court erred in receiving in evidence that part of the report of libellant's witness Donald V. Murphy, which pertains to R. Beck, a broker at 519 University Bldg., Syracuse, N. Y., and which was marked Libellant's Exhibit No. 65.

47. The Court erred in denying respondent's motion to strike out that part of libellant's witness Donald V. Murphy's answer in relation to a meeting with one Joe Beck in 1924 or 1925.

48. The Court erred in permitting the libellant's witness Donald V. Murphy to testify over the respondent's objection in answer to the following question:

"Will you state the reason pure grain alcohol cannot be diverted as easily as specially denatured alcohol or C. D. 5."

49. The Court erred in allowing the following witnesses to testify over the respondent's objection:

Frank M. Himpler, Joseph F. Kennedy, Henry H. Clark, Leslie Penoyer, William S. Griffin, Thomas Pickard, Joseph A. Plouffe, William T. Rooney, Edward N. Peck, Jr., Andrew A. Speach, J. Dwight Atwater, Chester Baker, Fred [fol. 298] J. Fagan, Harry Kemper, Victor Wild, Bernard Moore, Joseph Simone, Charles Boyd, Thomas Patterson, Henry Searles, John C. Cullen, William English, Frank Sontheimer, Carl Busch, Timothy Berney, and the Court further erred in refusing to strike out all the testimony of these witnesses.

50. The Court erred in receiving in evidence Libellant's Exhibits 67, 68, 69 and 70.

51. The Court erred in refusing to strike out the testimony of the libellant's witness Leroy J. Birtell.

52. The Court erred in refusing to strike out all the testimony of libellant's witness Edward F. Rosen.

53. The Court erred in receiving in evidence Libellant's Exhibits 74, 75 and 76.

54. The Court erred in receiving in evidence Libellant's Exhibits 71, 72 and 73.

55. The Court erred in refusing to strike out the testimony of libellant's witness Fred S. Smith.

56. The Court erred in receiving in evidence Libellant's Exhibits 77 and 78.

57. The Court erred in refusing to strike out the testimony of libellant's witness Al Johnson.

[fol. 299] 58. The Court erred in receiving in evidence Libellant's Exhibits 79, 80, 81 and 82.

59. The Court erred in permitting the libellant's witness John W. Fonner to testify as to the analysis made by him of the ten Exhibits 54 to 63 inclusive and that they were specially denatured alcohol.

*60. The Court erred in receiving in evidence Libellant's Exhibits 54, 55, 56, 57, 58, 59, 60, 61, 62 and 63.

61. The Court erred in permitting the libellant's witness John C. Timlin to testify in relation to conversation had with him and Mr. Charles H. Fingerhood in August, 1927.

62. The Court erred in permitting libellant's witness William Shakespeare to testify in relation to trucks on the road between Syracuse and Auburn, and as to what the drivers of such trucks produced when interrogated by said witness Shakespeare.

63. The Court erred in permitting the libellant's witness William Shakespeare to testify as to conversation he had with a driver of a truck on the Syracuse-Auburn Highway and as to what was produced by such driver and shown to the witness Shakespeare.

64. The Court erred in permitting libellant's witness William Shakespeare to testify as to the opening of the back door of the truck on the Syracuse-Auburn road and as to [fol. 300] what he saw therein.

65. The Court erred in permitting the libellant's witness William Shakespeare to testify as to his calling up on the telephone and telling what he did, and as to what was shown him by the driver of the truck.

66. The Court erred in permitting Libellant's witness John F. Williams to testify as to the contents of Libellant's Exhibits 28, 29 and 30 for Identification.

67. The Court erred in receiving in evidence Libellant's Exhibits 28, 29 and 30 formerly the Libellant's Exhibits for Identification Nos. 28, 29 and 30.

68. The Court erred in receiving in evidence and permitting the libellant's witness John F. Williams to testify in relation to Libellant's Exhibits 48, 49, 50 and 51.

69. The Court erred in permitting libellant's witness John F. Williams to testify with reference to specially denatured alcohol No. 40 made from alcohol to which 25 gallons of isopropyl alcohol would be added to a tank containing 5,000 gallons of alcohol, mixed and denatured and as to the pounds of brucine to go into such mixture.

70. The Court erred in permitting the libellant's witness John F. Williams to testify as to the easiness or difficulty to redistill specially denatured alcohol No. 40 and as to the [fol. 301] number of times it would be necessary to redistill specially denatured alcohol No. 40 in order to remove the isopropyl and the brucine.

71. The Court erred in permitting the libellant's witness John F. Williams to testify as to the amount of wood alcohol he would be using if he were denaturing 5,000 gallons of alcohol at one time in a tank.

72. The Court erred in allowing the libellant's witness John F. Williams to testify if it were easy or difficult to redistill or to remove denaturants from C. D. No. 5.

73. The Court erred in permitting the libellant's witness J. Vincent Labate to testify as to what he thought of Mr. Fingerhood being a member of the Board of Directors in October, November and December, 1926.

74. The Court erred in permitting the libellant's witness J. Vincent Labate to testify as to whether he was in Waterloo at any time during the months of October, November and December, 1926, and as to whether he attended a Board of Directors' meeting in Waterloo in any of those three months.

75. The Court erred in permitting the libellant's witness J. Vincent Labate to testify as to whether W. H. Long & Co. ever had a meeting in October, November and December, 1926.

[fol. 302] 76. The Court erred in permitting the libellant's witness J. Vincent Labate to testify that the Waterloo Distilling Corporation owned all the stock of W. H. Long & Co. in October, November and December, 1926.

77. The Court erred in permitting the libellant's witness J. Vincent Labate to testify as to whether his signature was at any bank, so that he could sign a check during the period of October, November and December, 1926.

78. The Court erred in permitting the libellant's witness J. Vincent Labate to testify as to who was running the Waterloo Distillery in October, November and December, 1926.

79. The Court erred in permitting the libellant's witness J. Vincent Labate to testify as to when Mr. Baur was made the Manager and was running the Waterloo Distillery in October, November and December, 1926.

80. The Court erred in permitting the libellant's witness J. Vincent Labate to testify as to what Mr. Fingerhood told him in New York City in relation to Mr. Rodenberg resigning and Mr. Bauer running the plant and as to who the directors were on October 1st, 1926.

81. The Court erred in permitting the libellant's witness J. Vincent Labate to testify as to his attending a meeting about October 1st, 1926, with Mr. Fingerhood and electing Mr. Bauer President.

82. The Court erred in permitting the libellant's wit- [fol. 303] ness J. Vincent Labate to testify that he did not attend a meeting of the Board of Directors at which Mr. Bauer was elected President.

83. The Court erred in permitting the libellant's witness J. Vincent Labate to testify as to his attending a meeting of the Board of Directors of the Waterloo Distilling Corporation in New York City on the 4th day of October, 1926, at 2 P. M. and as to his attending any meeting on the 4th day of October, 1926, in which Rodenberg was present.

84. The Court erred in permitting the libellant's witness J. Vincent Labate to testify in relation to who presented minutes marked Libellant's Exhibit 83 to him for signature.

85. The Court erred in permitting the libellant's witness J. Vincent Labate to testify as to whether the Waterloo Distilling Corporation at any time had accepted the resignation of Rodenberg as President.

86. The Court erred in permitting the libellant's witness J. Vincent Labate to testify as to whether he as Secretary and Treasurer of the Waterloo Distilling Corporation had ever seen the books of W. H. Long & Co. and as to whether the Waterloo declared any dividends in October, November and December, 1926.

87. The Court erred in permitting the libellant's witness J. Vincent Labate to testify in relation to anyone going

[fol. 304] over with him the daily reports furnished to Fingerhood.

88. The Court erred in refusing to receive in evidence Respondent's Exhibit offered of the case of Zeltner vs. Henry Brown, 174 N. Y. 247 and the case of Craig Medicine Co. vs. Merchants Bank, 59 Hun. 561 and the case of Lyon vs. Westside Transfer Co., 132 App. Div. 177.

89. The Court erred in refusing to strike out that part of the libellant's witness J. Vincent Labate testimony that pertains to the by-laws of certified resolutions received in evidence.

90. The Court erred in permitting the libellant's witness J. Vincent Labate to testify that R. C. Harper is the man who later became Administrator for the State of New York in 1926.

91. The Court erred in permitting the libellant's witness J. Vincent Labate to testify as to whether there was any mortgage given on the plant to secure the bonds, Libellant's Exhibit 86.

92. The Court erred in permitting the libellant's witness Martha E. Meyers to testify in relation to the salary during October, November and December, 1926, of Mr. Bauer as President and O'Malley.

93. The Court erred in refusing to grant the motion of the respondents to dismiss the libel at the end of the libellant's case.

[fol. 305] 94. The Court erred in failing to dismiss the libel as to all the real property outside the bonded premises.

95. The Court erred in failing to dismiss at the end of the libellant's case that part of the libel that pertains to pure grain alcohol on the ground that the Government had failed to prove facts sufficient as a foundation for intent to defraud the Government of any tax, by reason of its use, it being intact and never used, and relates to something in the future and continually in the control and possession of the United States.

96. The Court erred in failing to dismiss the libel upon the motion of the respondents at the end of the libellant's case, on the ground that the second paragraph cited in the

libel, as the basis of the proceeding insofar as they lack a tax on alcohol for beverage purposes, is unconstitutional and against the provisions of the Eighteenth Amendment of the Federal Statutes.

97. The Court erred in failing to dismiss the libel upon the motion of the respondents at the end of the libellant's case as to all the property named in the libel on the ground that the Government had failed to prove facts sufficient to [fol. 306] constitute a cause of action alleged in the libel, and upon the further ground that all the section cited in the libel as the basis therefor, referred to distilled spirits, and that denatured alcohol is not a distilled spirit.

98. The Court erred in permitting the respondent's witness Ludwig Bauer to testify on cross examination as to the amount of stock he owned in 1924 in W. H. Long & Co., and as to how much he received for his stock when he sold it.

99. The Court erred in receiving in evidence Libellant's Exhibit 13.

100. The Court erred in permitting the witness Bauer to testify on cross examination in relation to the total of $209,467.32 advanced to Waterloo Distilling Corporation from Austin-Bagley from May 27th, 1925 to January 31st, 1928.

101. The Court erred in refusing to allow the witness Martha E. Meyers to testify as to whether in October, 1926, Mr. Bauer was a short, thick man.

102. The Court erred in receiving in evidence Libellant's Exhibit No. 87.

103. The Court erred in permitting the libellant's witness Robert Takel, Jr., to testify that the pipe line is not [fol. 307] used very much upon the ground that same was part of the affirmative case.

104. The Court erred in failing to strike out from the evidence all the exhibits as to all shipments and seizures, and the evidence pertaining to these shipments and seizures, upon the ground that they are not connected in such a way as to be competent evidence on the respondents.

105. The Court erred in failing to grant all the motions made by the respondents at the close of the Government's case as previously made during the trial.

106. The Court erred in denying the respondent's motion requesting that on the verdict of the jury the Court direct that it be incorporated as part of the proposed decree to be entered in the proceeding, that the libel of all real property outside of the bonded premises, except the part outside of said bonded premises, if any, as was used by the Waterloo Distilling Corporation for purpose of ingress and egress to the bonded premises, and also the part outside of the bonded premises in which the trucks were stored, and the lands used for purposes of ingress and egress to such garage to other parts of the bonded premises, be dismissed.

107. The Court erred in denying the respondent's mo-
[fol. 308] tion to set aside the verdict of the jury and for a new trial upon all the exceptions in the case, and upon the ground that the verdict of the jury was contrary to law and against the weight of evidence.

Lewis Landes, Attorney for Respondents-Appellants, Office & P. O. address: No. 233 Broadway, City of New York, and Thomas L. Newton, Attorney for Respondents-Appellants, No. 601 Walbridge Building, Buffalo, New York.

To Richard H. Templeton, United States Attorney, Attorney for Libellant-Appellee, Buffalo, New York.

Read and ordered filed February 21st, 1929.
Simon L. Adler, U. S. Judge.

[fol. 309] In United States District Court

[Title omitted]

Stipulation in Regard to Exhibits

[fol. 310] It is hereby stipulated by and between the parties hereto, through their respective attorneys, that the foregoing printed copy is a true transcript of the record

upon review in the above entitled cause upon the appeal taken herein by libellees-appellants.

It is further stipulated by and between the attorneys for the respective parties that the foregoing record does not contain all the exhibits used on the trial of the issues in the District Court, as the same were read and shown to the jury on the trial, but inasmuch as some of said exhibits, by reason of size and appearance, were such that it was impossible to print with accuracy as to form or appearance.

It is hereby stipulated that either of the parties may file with the Clerk of this Court, under the provisions of Rule Thirty-One of the Circuit Court of Appeals for the Second Circuit, any of such exhibits either party may desire to be prepared at the expense of the libellees-appellants.

Dated September —, 1929.

Richard H. Templeton, United States Attorney; Lewis Landes and Thomas L. Newton, Attorneys for Libellees-Appellants.

[fol. 311] IN U. S. CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

STIPULATION AND ORDER AS TO PRINTING AND FILING OF EXHIBITS

[fol. 312] It is hereby stipulated, consented and agreed that the exhibits on the appeal in the within matter may be filed in three books of photostat copies of such exhibits, and that it is unnecessary to attach the exhibits to the copies of the record on appeal, the exhibits being voluminous, the rule requiring all exhibits to be attached to the record on appeal is hereby waived.

Dated New York, September 16th, 1929.

Lewis Landes and Thos. L. Newton, Attorneys for Libellees-Appellants. Richard H. Templeton, United States District Attorney.

So ordered.

Manton, U. S. C. C.

Dated New York, September 19, 1929.

[fol. 313] In United States District Court

[Title omitted]

Order Extending Time to Perfect Appeal

[fol. 314] Upon the annexed stipulation, it is hereby

Ordered that the term of this Court be, and hereby is extended to the first day of October, 1929, for the purpose of serving and filing the record on appeal in the above case, and the term of the Court is extended to said date, for all purposes.

Dated Buffalo, New York, August 12th, 1929.

John R. Hazel, U. S. D. J.

[fol. 315] In United States District Court

[Title omitted]

Stipulation Extending Time to Perfect Appeal

[fol. 316] It is hereby stipulated between the parties hereto, that the time for the libellees-appellants to serve and file their record on appeal, for the United States Circuit Court of Appeals, Second Circuit, be and the same hereby is extended to the first day of October, 1929, and that the term of this Court be extended to said day for all purposes.

Dated Buffalo, New York, August 12th, 1929.

Richard H. Templeton, United States District Attorney. Lewis Landes and Thos. L. Newton, Attorneys for Libellees-Appellants.

[fol. 317] In United States District Court

[Title omitted]

Order Extending Time to Perfect Appeal

[fol. 318] Upon the annexed stipulation, it is hereby

Ordered that the Term of this Court be, and hereby is extended to the fifteenth day of October, 1929, for the pur-

pose of serving and filing the record on appeal in the above case, and the Term of the Court is extended to said date, for all purposes.

Dated Buffalo, New York, September 18, 1929.

John R. Hazel, U. S. D. J.

[fol. 319] In United States District Court

[Title omitted]

Stipulation Extending Time to Perfect Appeal

[fol. 320] It is hereby stipulated between the parties hereto, that the time for the libellees-appellants to serve and file their record on appeal, for the United States Circuit Court of Appeals, Second Circuit, be and the same hereby is extended to the fifteenth day of October, 1929, and that the Term of the Court be extended to said day, for all purposes.

Dated Buffalo, New York, September 18, 1929.

Richard H. Templeton, United States District Attorney. Lewis Landes and Thos. L. Newton, Attorneys for Libellees-Appellants.

[fol. 321] In United States District Court

[Title omitted]

Stipulation as to the Record

[fol. 322] It is hereby stipulated and agreed, that the foregoing is a true copy of the transcript of the record of the said District Court in the above entitled matter, as agreed upon by the parties.

Dated New York, September 30th, 1929.

Lewis Landes and Thos. L. Newton, Attorneys for Libellees-Appellants. Richard H. Templeton, Attorney for Libellant-Appellee.

Settled as of Sept. 30, 1929.

Simon L. Adler, P. J.

[fol. 323] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 324] In United States Circuit Court of Appeals for the Second Circuit

United States of America, Libellant-Appellee,

against

The Various Items of Personal Property, Etc., and the Various Items of Real Property, etc.; The Waterloo Distilling Corporation, The Seneca Solvents & Chemical Corp., Max Rein, and Fannie Rein, Claimants-Appellants

Appeal from the District Court of the United States for the Western District of New York

Before Manton, Swan, and Augustus N. Hand, Circuit Judges

Opinion

Libel by the United States for forfeiture under Sections 3257 and 3281 of the Revised Stat-es of property constituting the distillery, warehouse and denaturing plant, and their contents, of Waterloo Distilling Corporation. This corporation, Seneca Solvents a-d Chemical Corporation, and Max Rein and Fannie Rein filed answers as claimants. Upon verdict of a Jury, judgment of forfeiture was entered January 31, 1929. The claimants have appealed. Affirmed.

On premises located within the Western District of New York, Waterloo Distilling Corporation conducted the business of distilling and denaturing alcohol under permit from the Bureau of Prohibition. The libel charges that between [fol. 325] October 1, 1926, and March 1, 1927, it attempted to defraud, and carried on its business as a distiller with intent to defraud, the United States of the tax imposed by Section 600A of the Revenue Act of 1918, as amended (26 U. S. C. A. sec. 245), whereby the property libeled became subject to forfeiture under Sections 3257 and 3281 of the Revised Statutes. Count 1 relies upon the latter Section and count 2 the former. The fraud consisted in

withdrawing large quantities of alcohol, ostensibly for non-beverage purposes but in fact for beverage purposes, without payment of the tax. This was accomplished by withdrawing pure alcohol ostensibly for complete denaturing but actually used to make specially denatured alcohol, falsely reporting to the Government officials the specially denatured alcohol as completely denatured, and selling it under such circumstances that the Jury could, and evidently did, infer an intent on the part of Waterloo Distilling Corporation that those to whom it sold, or other unknown persons, would "clean" it and use it for beverage purposes.

The property proceeded against is described in Schedule A (personal property) and Schedule B (real estate) attached to the libel. Seizure of said property was made by the Prohibition Administrator on August 15, 1928, and shortly thereafter this libel of information was filed by the United States Attorney under authority given by the Commissioner of Prohibition in conformity with Section 3214 of the Revised Stat-es. Prior to the seizure part of the property had been sold by Waterloo Distilling Corporation to the other claimants.

By amendment to their answers the claimants set up as a defense the fact that Waterloo Distilling Corporation had been convicted of a conspiracy to violate the National Pro-[fol. 326] hibition Act by reason of the same acts charged in the libel as the ground of forfeiture.

Lewis Landes, for Appellants.

Richard H. Templeton, United States Attorney, for Appellee. Justin C. Morgan, Asst. U. S. Attorney, of Counsel.

SWAN, Circuit Judge:

The judgment of forfeiture is challenged upon several grounds:

(1) The seizure by the Prohibition Administrator was illegal; (2) No tax was payable under Section 600A of the Revenue Act; (3) If such a "tax" was payable, it was in reality a penalty and so not within the contemplation of Sections 3257 and 3281 of the Revised Statutes; (4) Those Sections are in direct conflict with the National Prohibition Act and are no longer in force; and (5) The conviction of

Waterloo Distilling Corporation is a bar to the libel of forfeiture.

(1) Legality of the seizure is attacked upon the ground that a Prohibition Officer is not an Internal Revenue Officer and only the latter may make a valid seizure for a violation of the Revenue Laws. But we need not pass upon the merits of this argument, because, if the seizure were illegal, the Government could adopt it for purposes of a libel of forfeiture. United States v. One Ford Coupe, 272 U. S. 321, 325; Dodge v. United States, 272 U. S. 530; United States v. One Ice Box, 37 F. (2d) 120 D. C. N. D. [fol. 327] 111). Here it was adopted. We do not understand that the authority of the Commissioner of Prohibition to sanction the proceedings, as required by Section 3214 Rev. Stats. is questioned; nor could it be, in view of the Act of March 3, 1927. (5 U. S. C. A. sec. 281c).

(2) It is claimed that no tax was payable under Section 600A of the Revenue Act of 1918 as amended (26 U. S. C. A. section 245). Waterloo Distilling Corporation was authorized under its permits to distill pure alcohol and to denature it. No tax is imposed on alcohol withdrawn bona fide for denaturing, or on alcohol lawfully denatured (27 U. S. C. A. sections 80, 81). But said Section 600A, as amended provides:

"On and after February 26, 1925, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the persons responsible for such diversion. If a tax at the rate of $2.20, $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph."

The diversion to beverage purposes claimed by the Government to have given rise to a tax under this Section is set forth in the statement of facts. Appellants argued that this type of diversion is not within the words of the Statute be-

cause (a) pure alcohol (distilled spirits), as such, was not diverted to beverage purposes, and (b) specially denatured alcohol (the "article" manufactured from distilled spirits) was not used or intended for use as a beverage. This argument cannot prevail. Its first branch assumes that diversion of the pure alcohol must be direct, that is, that [fol. 328] the alcohol must be used as a beverage without passing through any non-potable state before being so used. What language of the Statute justifies this assumption? It would seem that the pure alcohol was diverted to beverage purposes when removed from the distillery or warehouse with intent that it should be ultimately used for such purposes although in the meantime denaturants were to be inserted by the distiller and subsequently removed by purchasers from it or by persons unknown. The Government, however, does not insist upon this construction, but relies upon the second clause of the Statute. Under this clause the article manufactured must be used or intended for use as a beverage. But we do not think that this means, as appellants contend, that it must be fit for use as a beverage without further treatment. Such a construction would be too narrow to protect the Government against evasion of taxes. United States v. Stowell, 133 U. S. 1, 12, Mr. Justice Gray said:

"By the now settled doctrine of this Court (notwithstanding the opposing dictum of Mr. Justice McLean in United States v. Sugar, 7 Pet. 463, 462, 463), Statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore, although they impose penalties or forfeitures, not to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the Legislature."

Section 485 of Title 26 U. S. C. A. is referred to in support of appellants' argument, but we are unable to see its materiality and assuming it to be still in force as to which we express no opinion. See Editorial comment under 26 U. S. C. A. section 481. A section invoked declares of punishment of one who attempts to "clean" denatured alcohol. It has no bearing on what constitutes diversion so as to [fol. 329] create tax liability under Section 600A.

Nor is it material that the diversion was also a violation of Section 4 of Title 2 of the National Prohibition Act (27 U. S. C. A. section 13). The intent of Congress to levy taxes upon illicit intoxicating liquor was put beyond question by the enactment of the Willis Campbell Act (27 U. S. C. A. section 3) after the decision of United States v. Yuginovitch, 256 U. S. 450. See United States v. Stafoff, 260 U. S. 477; also 27 U. S. C. A. sections 52, 53, 83, 86. We cannot doubt that in amending, in 1926, section 600A to read as above quoted, Congress intended to tax alcohol diverted to beverage purposes even though the diversion was also a criminal offense under the Prohibition Act.

(3) The next contention of appellants is that the "tax" imposed is in reality a penalty, and so not within the contemplation of sections 3257 and 3281 of the Revised Statutes. Lipke v. Lederer, 259 U. S. 557 and Regal Drug Co. v. Wardell 260 U. S. 386 are relied upon. These cases held that Section 3224 Revised Statute- forbidding suits to enjoin collection of a tax did not apply to a so called tax which was really a penalty for illegally selling liquor. We do not see their relevancy to the present controversy. The argument in brief is that no tax, but only a penalty, can be laid on distilled spirits illegally diverted. Much the same contention was advanced in United States v. One Ford Coupe 272 U. S. 321, 328, and there rejected, the Court saying:

"A tax on intoxicating liquor does not cease to be such because the sovereign has declared that none shall be manufactured, and because the main purpose in retaining the tax is to make law-breaking less profitable."

We must likewise reject it.

[fol. 330] (4) The judgment is challenged on the theory that Sections 3257 and 3281 are in direct conflict with Section 25 and Section 22 of Title 2 of the Prohibition Act (27 U. S. C. A. Sections 3934), in which event the latter prevail (27 U. S. C. A. Section 3). Section 25 relates to property seized under a search warrant and makes the property so seized subject to such disposition as the Court may order. Had there been such a seizure that Section might preclude forfeiture under the Revenue Laws. Cf. Commercial Credit Co. v. United States, 276 U. S. 226. But that question is not before us and need not be passed upon. In the present

case there is no conflict between the Prohibition Act and Section 3257. No proceedings had been begun under that Act which might end in forfeiture of the property libelled. See United States v. One Ford Coupe, supra: Commercial Credit Co. v. United States, supra. There is even less basis for claiming a direct conflict between Section 22 and Section 3281.

(5) The final contention is that conviction of Waterloo Distilling Company upon a charge of conspiracy to violate the National Prohibition Act (see United States v. Austin-Bagley Corp., 31 F. (2d) 229) operates as a bar to a libel for forfeiture under said Sections 3257 and 3281. Reliance is placed upon the following language of the Willis Campbell Act (27 U. S. C. A. 3):

"* * * But if any act is a violation of any such laws (Revenue Laws) and also of this Title (National Prohibition Act), a conviction under one shall be a bar to prosecution therefor under the other."

It is argued that this saving clause was unnecessary if it be confined to criminal prosecutions, for two convictions are prohibited by the Constitutional protection against [fol. 331] double jeopardy; hence it should be construed to include civil actions for fines or forfeitures. We do not consider the argument convincing, even if it be assumed that conviction on the conspiracy charge should be deemed equivalent to conviction under the Prohibition Act in considering this question. "Conviction" and "prosecution" are words aptly chosen to refer to criminal proceedings. Even if the words may be extended to cover a civil proceeding to collect a fine, as seems to have been held in La France v. United States, 37 F. (2d) 269 (C. C. A. 5), we do not think they embrace a libel of forfeiture against property, where "it is not so much the owner as the property that offends." (Words of Chief Justice Taft in Carroll v. United States, 267 U. S. 132, 158). Under the old law conviction of the owner for criminal violation of the Revenue Statutes did not prevent another proceeding for condemnation of the forfeited property; nor forfeiture bar conviction. United States v. Three Copper Stills, 47 F. 495 (D. C. Ky.); United States v. One Machine for Corking Bottles,

267 F. 501 (D. C. N. D. Wash); United States v. Olsen, 57 F. 579 (D. C. N. D. Cal); Wood v. United States, 204 F. 55 (C. C. A. 4). Such authorities as have come to our attention indicate that the rule is not different when the conviction is under the National Prohibition Act. United States v. 385 Barrels of Wine, 300 F. 565 (D. C. S. D. N. Y.); United States v. One Ice Box, supra; See Murphy v. United States (C. C. A. 7) reported in U. S. Daily Feb. 20, 1930.

Judgment affirmed.

[fol. 332] In United States Circuit Court of Appeals, Second Circuit

United States, Libellant-Appellee,

v.

Various Items of Personal Property, etc.; Waterloo Distilling Corporation et al., Claimants-Appellants

Judgment—Filed April 21, 1930

Appeal from the District Court of the United States for the Western District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 333] [Endorsed:] United States Circuit Court of Appeals, Second Circuit.

File endorsement omitted.

[fol. 334] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 335] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,024. U. S. Circuit Court of Appeals, Second Circuit. Term No. 114. Various Items of Personal Property, etc.; The Waterloo Distilling Corporation, et al., petitioners, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed May 14, 1930. File No. 35,024.

FILE COPY

Office Supreme Court, U.S.
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CHARLES ELMORE CROPLEY
CLERK

No. 114

In the Supreme Court of the United States

OCTOBER TERM, 1930

VARIOUS ITEMS OF PERSONAL PROPERTY, ETC., THE WATERLOO DISTILLING CORPORATION ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE UNITED STATES TO ADVANCE

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 114

VARIOUS ITEMS OF PERSONAL PROPERTY, ETC., THE Waterloo Distilling Corporation et al., petitioners

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE UNITED STATES TO ADVANCE

Comes now the Solicitor General, on behalf of the United States of America, and moves the Court to advance the above-entitled cause for hearing immediately after the argument in case No. 74, *United States* v. *Anthony LaFranca,* on the docket of this Court, and as grounds for the motion respectfully represents:

1. Case No. 114, sought to be advanced, is before the Court on a writ of certiorari, granted October 13, 1930, to review a judgment of the Circuit Court of Appeals for the Second Circuit which affirmed

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a judgment of the District Court for the Southern District of New York declaring forfeited under Sections 3257 and 3281 of the Revised Statutes a distillery, warehouse, and denaturing plant of the petitioner corporation. Sections 3257 and 3281 provide for the forfeiture of property of a distiller who defrauds or attempts to defraud the United States of the tax on the spirits distilled, or who engages in such business with intent to defraud the United States of such tax. The tax in question was alleged in the libel to be that imposed by Section 600 (a) of the Revenue Act of 1918, as amended.

The case presents, among others, the following questions: (1) Whether under the decisions of this Court in *Lipke* v. *Lederer*, 259 U. S. 557, and *Regal Drug Corp.* v. *Wardell*, 260 U. S. 386, the "tax" imposed by Section 600 (a) is in reality a penalty, so that the defrauding or attempting to defraud of it did not constitute a defrauding or attempting to defraud of a "tax," within the meaning of Sections 3257 and 3281; and (2) whether by reason of the fact that the petitioner corporation had been convicted because of the same transaction of having conspired with others to violate the National Prohibition Act, the Government was barred from proceeding to forfeit the property of that company by Section 5 of the Willis-Campbell Act, which declares that, if an act is a violation of the National Prohibition Act and also of the prior internal-

revenue laws, a conviction for such act under one of those laws shall bar a prosecution therefor under the other.

2. In case No. 74, *United States* v. *Anthony LaFranca*, which is before the Court on a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, granted May 5, 1930, the Government brought suit to recover from LaFranca double taxes and penalties alleged to have been incurred by him under Section 35, Title II, of the National Prohibition Act, and under other statutes, because of sales of liquor for which he had been previously convicted under that Act. A judgment for the United States was reversed by the Circuit Court of Appeals on the ground that the suit was barred by Section 5 of the Willis-Campbell Act because: (1) Under the decisions in the *Lipke* and *Regal Drug Corporation cases, supra*, the so-called "taxes" and other charges sued for were penalties imposed for criminal misconduct; (2) a civil suit for the recovery of such a "penalty" may properly be regarded as a prosecution for an offense, and (3) as liability for the "taxes," the doubled amount of which was sued for, arose under the prior internal revenue laws, the suit was a prosecution which was barred by Section 5 of the Willis-Campbell Act, because the taxes sued for were penalties incurred by reason of the acts for which there had been a prior conviction under the National Prohibition Act.

3. As substantially the same questions are involved in the two cases, it is believed that the argument of the *Waterloo Distilling Corporation case* should immediately follow the argument of the *LaFranca case* in order that the two cases may conveniently be considered and disposed of by the Court at the same time. Therefore, this motion is presented.

Notice of this motion has been served on opposing counsel.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

NOVEMBER, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. ~~893~~ 114

VARIOUS ITEMS OF PERSONAL PROPERTY, ETC., THE WATERLOO DISTILLING CORPORATION, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LEWIS LANDES,
Counsel for Petitioner.

(35,024)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 893

THE VARIOUS ITEMS OF PERSONAL PROPERTY, DISTILLING EQUIPMENT AND OTHER ARTICLES LOCATED AT THE PREMISES OF THE WATERLOO DISTILLING CORPORATION, LOCATED AT 43 RACE STREET, IN THE VILLAGE OF WATERLOO, NEW YORK, AND OF WHICH AN ITEMIZED STATEMENT IS SET OUT HEREIN AND IMMEDIATELY FOLLOWING UNDER THE HEADING OF "SCHEDULE A", AND THE VARIOUS ITEMS OF REAL PROPERTY BELONGING TO THE WATERLOO DISTILLING CORPORATION, SENECA SOLVENTS & CHEMICAL CORPORATION, MAX REIN, AND FANNIE REIN, BEING SITUATE IN THE VILLAGE OF WATERLOO, NEW YORK, AND DESCRIBED AND SET FORTH HEREIN IMMEDIATELY FOLLOWING UNDER THE HEADING OF "SCHEDULE B", PETITIONERS.

THE WATERLOO DISTILLING CORPORATION, THE SENECA SOLVENTS & CHEMICAL CORPORATION, MAX REIN, FANNIE REIN, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION.

LEWIS LANDES, the attorney for the petitioners above named, prays that a writ of certiorari issue to review

1*y*

the decree of the Circuit Court of Appeals for the Second Circuit entered in the above case on April 14th, affirming the decision of the District Court for the Western District of New York.

Questions Presented.

This case presents the following questions:

(1) Can the real and personal property of a distillery operating under a permit issued to it under the provisions of the National Prohibition Act to operate and conduct a distillery be ordered forfeited and destroyed for failure to pay taxes under the Internal Revenue Laws on denatured alcohol, which is tax free?

(2) Is there a conflict between the provisions of the National Prohibition Act and the Internal Revenue Laws, in relation to the forfeiture and destruction of real and personal property of a distillery, for alleged attempts to divert denatured alcohol which after denaturization is tax free?

(3) Have not the provisions of the National Prohibition Act in relation to industrial alcohol and the operation of distilleries under permits issued by the Prohibition Department under the Prohibition Act superseded the provisions of the Internal Revenue Law?

(4) Is Section 600-A of the Revenue Act applicable to the case at bar where the distilled spirits were not

diverted nor manufactured into any article used or intended for use as a beverage?

(5) Can Sections 3257 and 3281 of the Internal Revenue Laws be invoked?

(6) Are not Section 3257 of the Internal Revenue Laws, and Section 25, Title 2 of the National Prohibition Act, in direct conflict, and under the Willis-Campbell Act, a prosecution, if the two statutes conflict must be brought under the National Prohibition Act, which was not done in the proceeding at bar?

(7) Can the WATERLOO DISTILLING CORPORATION, having first been indicted and convicted for conspiracy to violate the provisions of the National Prohibition Act, be penalized under the provisions of the Internal Revenue Laws, or should not the Government have proceeded to condemn the real and personal property herein, under the provisions of the National Prohibition Act?

(8) Is not a criminal prosecution of the WATERLOO DISTILLING CORPORATION and its officers under the provisions of the National Prohibition Act, a bar to a subsequent proceeding to forfeit and condemn in a civil action under the Internal Revenue Laws?

(9) Is there a tax on denatured alcohol which is tax-free, and can there be a forfeiture for the alleged non-payment of a tax on alcohol, after it is actually denatured?

(10) The questions presented in this application are similar to the questions to be passed upon by this

Honorable Court, in *Anthony La Franca* vs. *United States of America,* writ allowed on May 5th, 1930.

(11) Can that part of the premises of a Distillery which premises is not bonded and which is not a part of the bonded distillery premises, be seized and forfeited under the Internal Revenue Laws, merely because it is owned by the same corporation which owns the bonded distillery premises?

Statutes and Regulations Involved.

Section 3214 of the Revised Statutes, is as follows:

> "No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner of Internal Revenue authorizes or sanctions the proceedings. Provided, That in case of any suit for penalties or forfeitures brought upon information received from any person, other than a collector or deputy collector, the United States shall not be subject to any costs of suit."

Section 3247 of the Revised Statutes, is as follows:

> "Every person who produces distilled spirits, or who brews or makes mash, wort or wash, fit for distillation or for the production of spirits, or who by any process of evaporization, separates alcoholic spirit from any fermented substance, or who, making or keeping mash, wort or wash, has also in his possession or use a still, shall be regarded as a distiller."

Section 3257 of the Revised Statutes is as follows:

> "Whenever any person engaged in carrying on the business of a distiller defrauds or at-

tempts to defraud the United States of the tax on spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises, and shall be fined not less than $500, and be imprisoned not less than six months nor more than three years."

Section 3281 of the Revised Statutes is as follows:

"Every person who carries on the business of a distiller without giving bond as required by law, or who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, shall, for every such offense be fined not less than $1,000 nor more than $5,000, and imprisoned not less than six months, nor more than two years. And all distilled spirits or wines, and all stills or other apparatus fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title and interest therein of every such person, who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all

personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress, to or from such distillery, which shall be found in any such building, yard or inclosure, and all the right, title and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States."

Section 600-A of the Revenue Act of 1918, as amended, is as follows (Section 245, Title 26, U. S. C. A.):

"S. 245. Tax on distilled spirits. There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the Internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law. * * *

(4) On and after February 26, 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person

responsible for such diversion. If a tax at the rate of $2.20, $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph."

The National Prohibition Act, Title II, c. 85, 41 Stat. 305, 307-311:

"SEC. 1. When used in Title II and Title III of this Act (1) The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 percentum or more of alcohol by volume which are fit for use for beverage purposes: * * *

* * * * * * *

(7) The term 'regulation' shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations (U. S. C., Title 27, Sec. 4.).

SEC. 3. * * * and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented (U. S. C., Title 27, Sec. 12).

* * * * * * *

SEC. 4. The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act if they correspond with the following descriptions and limitations, namely:

(a) Denatured alcohol * * * produced and used as provided by laws and regulations now or hereafter in force.

(b) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia, National Formulary, or the American Institute of Homeopathy that are unfit for use for beverage purposes.

(c) Patented, patent and proprietary medicines that are unfit for use for beverage purposes.

* * * * * * *

A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor * * * (U. S. C., Title 27, Sect. 13)."

Title III, Section 1 of the National Prohibition Act, provides as follows:

"SEC. 1. When used in this title—the term 'alcohol' means that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, from whatever source or whatever processes produced. The term 'container' includes any receptacle, vessel, or form of package,

tank, or conduit used or capable of use for holding, storing, transferring, or shipment of alcohol."

Statement.

The WATERLOO DISTILLING CORPORATION, a New York domestic corporation, had received permits from the Prohibition Authorities of the United States, to operate a distillery, for the manufacture of pure alcohol, and to conduct a denaturing plant, for the purpose of denaturing tax free alcohol. The Distillery had filed with the Government Surety Bonds to the extent of Three Hundred Thousand ($300,000.00) Dollars.

In the case at bar there is no charge that the Distillery diverted pure grain alcohol. It is conceded that the pure alcohol manufactured by the distillery was actually denatured and poisoned, in conformity with Regulations.

Denatured alcohol is defined in the Regulations promulgated by the Treasury Department, as follows: (Regulations No. 61, Revised July, 1925, p. 81.)

> "Art. 88. Denatured alcohol is ethyl alcohol to which has been added such denaturing materials as render the alcohol unfit for use as an intoxicating beverage. It is free of tax and is solely for use in the arts and industries."
>
> * * * * * * *
>
> "Specially denatured alcohol is ethyl alcohol so treated with denaturants as to permit of its use in a greater number of specialized arts and

industries than completely denatured alcohol. The character of the denaturant or denaturants is such that it may be sold, possessed, and used only pursuant to permit and bond except as otherwise provided herein."

"Art. 89. Alcohol may be withdrawn free of tax for denaturation in an approved denaturing plant as hereinafter provided. Rum must be denatured in accordance with the provisions of Regulations No. 30."

In September of 1928, the United States of America filed a libel of information through the United States Attorney, for the Western District of New York, praying for the seizure and condemnation of certain articles, materials, personal property and real property.

An answer was interposed on behalf of the Petitioners herein.

The trial of the issues raised by the pleadings began on December 13th, 1928, before the Honorable Simon L. Adler and a Jury. The verdict of the Jury was rendered on December 21st, 1928.

The petitioners appealed to the Circuit Court of Appeals for the Second Circuit from the judgment, and on the 14th day of April, 1930 the Court consisting of Circuit Judges Martin Manton, Thomas W. Swan and Augustus N. Hand, rendered a judgment affirming the decree of the Court below. A copy of the opinion is attached to the record submitted herewith.

An order has been granted by the Circuit Court directing that the issuance of the mandate be stayed

pending the hearing and determination by this Court of this application for a writ of certiorari.

A certified copy of the record in the court below accompanies this petition.

Your petitioners are advised by their counsel and verily believe that this case presents questions of law which, because of their national importance, should be passed upon by this Honorable Court.

Specification of Errors.

The Circuit Court of Appeals erred—

(1) In holding that the seizure of the real and personal property of the distillery was legal.

(2) In holding that there was a tax payable under Section 600-A of the Revenue Act of 1918 as amended, on denatured alcohol.

(3) In holding that the tax imposed is not in reality a penalty, and therefore within the provisions of Sections 3257 and 3281 of the Revised Statutes, contrary to Lipke *v.* Lederer, 259 U. S., 557.

(4) In holding that Sections 3257 and 3281 of the Internal Revenue Laws are not in direct conflict with Section 25 and Section 22 of Title 2 of the National Prohibition Act.

(5) In holding that the conviction of the WATERLOO DISTILLING CORPORATION upon a charge of conspiracy to violate the National Prohibition Act, does not oper-

ate as a bar to a further prosecution for forfeiture under Sections 3257 and 3281, in the form of a libel.

Reasons for Granting the Writ.

(1) That the case at bar is identical with the case to be passed upon by this Honorable Court, namely, Anthony La Franca *v.* United States of America, writ of certiorari being allowed on May 5th, 1930.

(2) That this is the first time since the enactment of the National Prohibition Act, that a distillery operating under a permit granted to it under the provisions of the National Prohibition Act, will have its property destroyed and seized for failure to pay a tax on denatured alcohol, which under the Law is tax free, and upon which the Government is not entitled to a tax.

(3) That the National Prohibition Act has superseded the Internal Revenue Laws, insofar as they apply to the forfeiture of distilleries and the seizure of its property.

(4) That the part of the premises of the distillery, not used for distillery purposes and not bonded, should not have been ordered forfeited and seized.

WHEREFORE it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit in the above case should be granted.

LEWIS LANDES,
Solicitor for Petitioners.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

LEWIS LANDES, being duly sworn, deposes and says that he is the attorney for the petitioners named herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

LEWIS LANDES.

Sworn to before me this 12th day of May, 1930.

BENJAMIN R. JHUNES,
Notary Public, Kings County.
Kings County Clerk's No. 670, Reg. No. 1321.
New York Co. Clerk's No. 1069, Reg. No. 111700.
Term expires March 30, 1931.

BRIEF IN SUPPORT OF THE PETITION.

Opinions Below.

The case was tried in the District Court, before a Jury. The opinion of the Circuit Court of Appeals has not yet been reported (R. 324).

Statement.

A statement of the case, the questions presented, and the statutes and regulations involved, will be found in the petition.

ARGUMENT.

I.

The libel should be dismissed on the grounds that Section 600-A of the Revenue Act is not applicable because no distilled spirits were diverted nor manufactured into an article used or intended for use as a beverage.

The WATERLOO DISTILLING CORPORATION was a New York corporation legally engaged in the business of operating a Distillery under a permit granted to it by the Prohibition Authorities.

It is the contention of the Government, that this corporation had attempted to defraul the United States of the tax provided by law on distilled spirits,

in that it failed to pay the tax at the beverage rate of $6.40 per proof gallon on distilled alcohol, as provided by Section 600-A of the Revenue Act of 1918, and that in view of this fact, all the property of the Distillery should be forfeited under Section 3281 as set forth in count one of the libel and Section 3257 as set forth in count two of the libel.

The Distillery is not accused of diverting pure alcohol, but that the Distillery after having manufactured the pure alcohol, did transfer it to the denaturing plant where it was actually denatured, and that thereafter, it is the position of the Government, the Distillery sent out of its plant specially denatured alcohol, when according to its books and records it was supposed to have completely denatured the alcohol.

The Chemists who testified in behalf of the Government, said that the analysis which they made of the exhibits in the case, showed it to be specially denatured alcohol number 40 (fols. 404-408).

Denatured alcohol is defined by Regulations No. 61 promulgated by the Treasury Department, revised July, 1925. (See page 9 herein.)

The procedure adopted by the Government, insofar as the operation of denaturing plants are concerned, are also set forth in Regulations 61 heretofore described.

The theory upon which this libel proceeding is brought, is that the WATERLOO DISTILLING CORPORATION defrauded, or attempted to defraud the Government of the *tax* on distilled spirits as provided in the Statute. The question to be determined, is whether

there is a tax on alcohol after it has been converted into denatured alcohol.

The section relied upon by the Government is Section 600-A (Section 245 U. S. C. A., Title 26), of the Revenue Act of 1918, as amended.

The tax referred to in this section is a tax on distilled spirits only. *Denatured alcohol is not a distilled spirit.* There is no tax on the article which is referred to in the section. Specially denatured alcohol which was manufactured, in the case at bar, was not a beverage. This is conceded by both parties, and the District Court so charged the Jury (p. 261).

The District Court (fols. 783-784) said, in speaking to the Jury:

> *"In arriving at your conclusion on that point, I call your atention to the fact that there is no direct evidence in this case that any particular bit of this alcohol that went out of that plant was diverted to some particular place, and at that particular place used for beverage purposes."* (Italics ours.)

1. It is therefore conceded, that the distilled spirits, as such, were not diverted.

2. It is further conceded that the WATERLOO DISTILLING CORPORATION did not manufacture "any article" which could be used as a beverage, as such, so that up to this point, in interpreting Section 600-A, the section is not applicable to the case at bar. It is conceded that denatured alcohol cannot be used as a beverage, as such. So the Government Chemist testified—so the Regulations provide. Specially denatured

alcohol is not potable as a matter of law. *Higgins* vs. *Foster et al.*, 12 Fed. (2d) p. 646. In deciding the *Higgins* vs. *Foster* case, the Court said in part:

> "It is true that it uses the word 'alcohol', but that especially in its context precludes denatured alcohol, which is not potable."

In this case, the only "article" manufactured by the distillery, was specially denatured alcohol number 40 (this is conceded by the Government) and that cannot be used *as such*, for beverage purposes, or as a beverage.

There is of course, no tax at all, on specially denatured alcohol. If any tax at all, is applicable in this case, it is only on the distilled spirits, but as has been stated, the tax on the distilled spirits contained in the specially denatured alcohol, cannot apply to this case, because the specially denatured alcohol cannot be used as such, nor intended for such, as a beverage.

If the section made reference to the article manufactured or produced, or any other liquid or article made from such article, then probably the tax would apply. But they speak specifically "of the article" which is used, or "the article" which is intended for use as a beverage, as such. No reference is made to the possibility of recovering the distilled spirits from the article manufactured. Section 3047 applies to such a situation and 3047 is not mentioned in the case.

The apparent intention of the section is, to levy a tax upon an intoxicating liquor and not upon an article

which is not intoxicating. In the case at bar, denatured alcohol is not intoxicating.

Intoxicating liquor is defined in the National Prohibition Act, Section 1, Title 2:

> "When used in Title 2 and Title 3 of this Act, (1) the word 'liquor' or the phrase, 'intoxicating liquor' shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt or fermented liquor, liquids and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes." * * *

The Circuit Court of Appeals in *Higgins* vs. *Foster*, *supra*, stated:

> "Section 6 uses the word 'liquor' which is defined by Section 1 of Title 2, and which seems to us clearly to be confined to beverages. It is true that it uses the word 'alcohol', but that, especially in its context, precludes denatured alcohol, which is not potable." * * *

Further proof that Sub-division 4 of Section 600-A relied upon in the libel was enacted for the purpose of taxing only intoxicating beverages and not any other alcohol, such as specially denatured alcohol, can be seen from the date of the amendment, to wit, February 26th, 1926.

Section 3047 of the Revised Statutes (Section 485, Title 26, Internal Revenue Law) covers such a situation.

Section 3047 provides that

> "any person * * * who shall recover or attempt to recover by redistillation or by any other process or means, any alcohol rendered unfit for beverage or liquid medicinal purposes under the provisions of this section * * * shall on conviction of each offense be fined no more than $5,000.00 * * * and shall in addition forfeit to the United States, all personal property used in connection with his business, together with the buildings and lots or parcels of ground constituting the premises on which such unlawful acts are performed or permitted to be performed."

However, Section 3047 is not mentioned in the libel and is not the basis for the forfeiture. The libel does not state, nor is there any proof in the record, that a recovery or an attempt to recover was made of the alcohol which was contained in the denatured alcohol. If Section 600-A provided for tax in those instances where a recovery or an attempted recovery of the distilled spirit was made, it would have so explicitly stated. It cannot be implied. The proof that Section 600-A was not intended to apply to such a situation is found in the fact that another Section, to wit, 3047, provides for punishment in those instances where a recovery or an attempted recovery is made of the distilled spirit by redistillation or other process.

II.

Sections 3257 and 3281 of the Internal Revenue Laws cannot be invoked for the reason that there is no tax on the articles referred to in those sections as applied to this case.

The Word "Tax" Means Penalty.

The National Prohibition Act specifically provides that denatured alcohol is not taxable (Section 4, N. P. A., Title 2). The purpose of the National Prohibition Act was to prevent illicit manufacture and sale of intoxicating liquor. It is not an Act for the purpose of raising revenue. There is no tax on denatured alcohol even if it is intended for beverage purposes. If there is no tax attached to denatured alcohol, there could be no fraud of revenue, and Sections 3281 and 3257 could not be invoked. Those sections are repealed by the National Prohibition Act.

In the case of *United States* against *2,000 cases of whiskey*, etc., in October, 1921 (277 Fed. p. 410), the Court held that the Eighteenth Amendment of the National Prohibition Act completely changed the policy of the United States, and decided that Section 3453 of the Revised Statutes of the United States could not be invoked for the purpose of bringing a libel proceeding on the grounds of alleged fraud of Internal Revenue, because there was no revenue of which the Government could be defrauded. The Circuit Court of Appeals said in part:

> "We are satisfied that the National Prohibition Act was not intended as a taxing measure in respect of intoxicating liquors for beverage purposes, but being a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes, it has elected its own machinery (as listed in Section 25, *supra*, and Title 2, Sec. 29), to accomplish the desired result.
>
> We are therefore of the opinion that Section 3453 has been repealed and hence the decree below should be affirmed."

The libel was dismissed.

Since this case was decided, the Willis-Campbell Act sought to reenact all prior Internal Revenue Laws regarding taxes on intoxicating beverages not inconsistent with the National Prohibition Act. Assuming then, that Section 600-A does permit a tax on intoxicating beverages, counsel urges that the tax referred to in said section is a penalty, and if it is a penalty, there is no fraud of revenue and again Sections 3257 and 3281, which provide for forfeiture in the event of fraud of revenue, cannot be invoked. This Court in *Lipke* vs. *Lederer*, 259 U. S., p. 557, said:

> "The mere fact that the Statute uses the word tax, does not make it a tax if from the general nature and intention of the Statute it is seen that a penalty is meant."

Whether or not the word "tax" means a penalty, depends upon whether or not the Statute is a punitive measure. In that case a so-called tax was levied on a

violator of the National Prohibition Act, under Section 35 of that Act, which provides for a double tax with an additional penalty of $500.00 on retail dealers, and a thousand dollars on manufacturers who violate any of the terms of the National Prohibition Act. An attempt was made to forfeit the property, both real and personal, of the defendant, unless the tax imposed was paid.

Lipke, who was charged with violation of the National Prohibition Act, filed a bill and sought an injunction preventing the proposed action of the Government to confiscate his property, and the Supreme Court of the United States in deciding the question, held that the mere use of the word "tax" is not enough to show that within the true intendment of the term, a tax was laid, when by the very nature of the imposition a penalty was meant.

In *Regal Drug Corporation* vs. *Wardell*, 260 U. S. 387, the Court said:

> "Since the decision of the Circuit Court of Appeals we have decided a case which is a necessary factor to be considered (Referring to *Lipke* vs. *Lederer*, quoted supra). * * *
>
> The distinction between a tax and a penalty was emphasized. The function of a tax, it was said, 'is to provide, for the support of the Government'; the function of a penalty clearly involves the 'idea of punishment for infringement of the law; and that a condition of its imposition is notice and hearing.'"

Section 608 (Section 506, Title 26, Internal Revenue) provides for a tax of $6.00 for every barrel of

fermented liquor brewed, manufactured, sold or removed for consummation or sale. In construing that section which was also reenacted by the Willis-Campbell Act in November, 1921, it has been held that the word "tax" mentioned in said section, means penalty. *U. S.* vs. *American Brewing Co.*, 296 Fed. 772, decided in 1924; *U. S.* vs. *2,615 Barrels*, 1 Fed. (2d) 500, decided in 1924.

In *U. S.* vs. *American Brewing Co., supra*, the Court said in part:

> "We are clearly of opinion that for several reasons the provisions of the Internal Revenue Laws do not apply to any of these cases, and these libels and search warrants must stand or fall under the authority of the National Prohibition Act. The authorization of warrants of search and seizure under the Internal Revenue Laws and Sections 3340 and 3450 of the Revised Statutes (Comp. St. SS 6146, 6352), dealing with the forfeiture of property, are solely in aid of the collection of taxes. But the so-called tax imposed by Section 608 of the Act of February 24, 1919 (Comp. St. Ann. Supp. 1919, S 6144 bb), re-enacted in 1921, is clearly a penalty and not a tax. The decisions of the Supreme Court are conclusive as to this. *Helwig* vs. *U. S.*, 188 U. S. 605, 23 Sup. Ct. 427, 47 L. Ed. 614; *Lipke* vs. *Lederer*, 259 U. S. 557, 42 Sup. Ct. 549, 66 L. Ed. 1061; *Regal Drug Corportation* vs. *Wardell*, 260 U. S. 386, 43 Sup. Ct. 152, 67 L. Ed. 318."

U. S. vs. *2,615 Barrels, supra,* in referring to Section 608 of the Revised Statutes, held as follows:

> "We are clearly of the opinion that for several reasons the provisions of the Internal Revenue Laws do not apply to any of these cases, and that these libels and search warrants must stand or fall under the authority of the National Prohibition Act and the other on violation of the Internal Revenue Laws. Both these counts are called upon by way of punishment of the defendant for the illegal manufacture and sale of the intoxicating beverages recited. This will not be sustained."

The taxes referred to in Sections 600-A and 608 of the Revised Statutes which were repealed by the National Prohibition Act, as held in the *Yuginovich* case decided by this Court and which were reenacted by the Willis-Campbell Act of November 23rd, 1921, does not necessarily mean that the taxes which were in effect prior to prohibition, now may be considered as taxes.

III.

Section 3257 of the Internal Revenue Laws, and Section 25, Title II, of the National Prohibition Act, are in direct conflict, and under the Willis-Campbell Act, a prosecution if the two laws conflict, must be brought under the National Prohibition Act.

Section 3257 which is the basis for count 2 of the libel.

Section 25 of Title 2 N. P. A., provides as follows:

> "It shall be unlawful to have or possess any liquor or property designed for the manufac-

ture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the Court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the Court shall otherwise order. No such warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term 'private dwelling' shall be construed to conclude the room or rooms used and occupied, not transiently but solely as a residence in an apartment house, hotel, or boarding house.

The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process."

If section 25 of Title 2, N. P. A., and 3257, are in direct conflict, then under the Willis-Campbell Act, 3257 remains repealed. Both sections refer to liquor. Both sections refer to personal property, and although the word, "property" is used in Section 25 of Title 2, personal property is meant for the reason that refer-

ence is made to a replevy of said property. Under Section 25, a seizure must be made by means of a search warrant, and under Section 3257, no search warrant is required to seize the personal property contained in the Distillery.

Under Section 3257, the property seized and forfeited, become confiscated to the Government, and in addition thereto, the person who carries on the Distillery subjected to a fine and imprisonment. No such provision is made in Section 25 of Title 2. On the contrary under Section 25 of Title 2, the liquor or property seized is subject to the disposition of the Court, only. A discretionary power is vested in the Court to dispose of the property, as the best interests of justice may require. Under Section 3257 of the Revised Statutes, the property becomes confiscated to the Government, and can be sold by the Government. Under Section 25 of Title 2, the property seized which was designed for the unlawful manufacture of liquor, must be destroyed, unless the Court otherwise orders. These two sections undoubtedly are in direct conflict and using the same line of reasoning, as contained in the *Commercial Credit Co.* vs. *The United States, infra,* it would appear that if any proceeding at all was taken by the Government, it was compelled to act under Section 25 of Title 2, instead of Section 3257.

In *Commercial Credit Co.* vs. *U. S.*, 276 U. S., page 226, decided on February 20th, 1928, this Court, analyzing the Internal Revenue Law under which a vehicle was forfeited, and Section 26, Title 2 of the National Prohibition Act which also provides for forfeiture of

vehicles, held that an essential distinction existed between the two sections, and dismissed the libel, on the grounds that there was a direct conflict between the two sections.

In *United States* vs. *63,250 Gallons of Beer,* 13 Fed. (2d), p. 242, Section 25 of Title 2 was construed to refer to personal property only, and not to realty. The court said in part:

> "'Section 25 of the National Prohibition Act is to be read in connection with the Espionage Act, which it incorporates. It relates to property which is movable, and can be disposed of as movable property by destruction or return, and which could be made the subject of replevin proceedings. Real estate and things annexed to real estate are not within its purview, but are to be dealt with under Section 22 of that act, in connection with the use of the premises.'
>
> "The same conclusion has been reached in other jurisdictions. See *Mellet & Nichter Brewing Co.* vs. *U. S.* (D. C.), 296 F. 765; U. S. *vs.* American Brewing Co. (D. C.), 296 F. 772-777."

IV.

Section 22 of the National Prohibition Act and Section 3281 of the Internal Revenue Laws are in Direct Conflict.

Section 3281 provides for the forfeiture of real property and for the forfeiture of any interest that a person may have in the lot or tract of land on which the Distillery is situated who knowingly permitted such acts to be done as to defraud or attempt to defraud the United States, of taxes.

Section 22 of Title 2 does not provide for the forfeiture of real property. It is not so drastic as Section 3281. It declares that an action to enjoin a nuisance may be brought where any house, room or building or place is used in violation of the National Prohibition Act, and that the premises may be padlocked. It also provides that leases may be forfeited at the option of the lessor, where the tenant has violated the National Prohibition Act. No provision is made with respect to innocent parties with respect to padlocking the premises. Under Section 22 of Title 2, it makes no difference whether the landlord had knowledge of the violations occurring in his premises. The place may be padlocked, irrespective of his knowledge or consent.

Section 3281 only permits the forfeiture of real property, where there is knowledge and intention on the part of the person with respect to the violations. In other words, under Section 3281 of the Revised Statutes, innocent owners of real property, are apparently protected. Under Section 3281, if the owner of the property did not know that the lessee was committing a crime, his premises cannot be forfeited.

Under Section 22 of the National Prohibition Act, the premises may be padlocked irrespective of the owners or landlord's innocence. There is an apparent conflict therefor, between Section 22 of the National Prohibition Act and Section 3281 of the Internal Revenue Laws, and if any proceedings at all were brought, with relation to the real property owned by the Waterloo Distilling Corporation, they should have been brought under the National Prohibition Act, to padlock the premises for a period of one year. Section

3281 of the Revised Statutes cannot be applicable, for the reason that there are no taxes on distilled spirts of which the Government can be defrauded. This apparently is the reason why the drastic punishment of confiscation was not carried over into the National Prohibition Act, and explains the reason for the conflicting penalties provided for in the event a Distiller does not comply with the Laws.

It was held in Re: Crescent Beverage Co., decided August 2, 1923, 297 Fed. p. 1009, that the real property can be seized and disposed of by the Government only as provided for in Section 22 of Title 2. The Court in that case held in part, as follows:

> "The right of the petitioner to conduct its plant had been recognized by the Bureau of Internal Revenue, and hence the seizure of its building, machinery and product in course of manufacture had no lawful foundation whatsoever. But, even if a proper foundation for a seizure had existed, the seizure of the premises could not properly be made by virtue of a search warrant, Section 22, Title 2 of the National Prohibition Act (Comp. St. Ann. Supp., 123, S. 10138½*k*), prescribes the method by which the brewery premises may be taken from the possession of the owner. Section 25 of the same act (Comp. St. Ann. Supp. 1923, S. 10138½*m*), and Title II of Public Law No. 24 of the 65th Congress, approved June 15, 1917 (40 Stat. p. 228 Comp. St. 1918, Comp. St. Ann., Supp. 1919, S. 10496½ a et sez), prescribed the practice after seizure upon search warrant, and was not observed in the present case. We are of the opinion that the seizure of the premises, ma-

> chinery and product in course of manufacture was without warrant of law, and think it is our duty in the premises to make an order for the return thereof."

Again the same conclusion was reached in U. S. vs. 63,250 Gallons of Beer, 13 Fed. (2d) p. 242, wherein the Court also stated, that real estate is not within the purview of Section 25 of the National Prohibition Act, but must be dealt with under Section 22. Both cases above quoted, were decided subsequent to the enactment of the Willis-Campbell Act on November 23rd, 1921, and the Courts held in both cases, that the National Prohibition Act must be followed, in the event any proceeding is taken with reference to the forfeiture of real or personal property.

V.

The Waterloo Distilling Corporation having been indicted and convicted together with others for conspiracy to violate the National Prohibition Act, penalties or suits for forfeitures because of said violations must be pursued under the National Prohibition Act on the theory that the Government having elected to indict and convict for violation of the National Prohibition Act is barred from making any further prosecutions under the Internal Revenue Laws.

The Waterloo Distilling Corporation Was Convicted for Violating the National Prohibition Act

The Waterloo Distilling Corporation, together with several other defendants, was indicted by the

Grand Jury of the United States at a Term of the District Court of the United States for the Western District of New York, for conspiracy to violate the terms of the National Prohibition Act, and the defendant corporation was found guilty of such violations and directed to pay a fine of $10,000.00 on June 2, 1928. The indictment against the defendant reads in part as follows, to wit, that the defendants

> "Knowingly, wilfully, unlawfully and feloniously did conspire, combine, confederate and agree together and with one and another and each with the other, and with divers other persons to said Grand Jurors unknown,—to wit; to knowingly, wilfully, unlawfully and feloniously violate the terms and provisions of an Act of Congress of October 28th, 1919, entitled an act to prohibit intoxicating beverages and to regulate the manufacture, production and use and sale of high proof spirits for other than beverage purposes and insure an ample supply of alcohol and promote the use in scientific research and in the development of fuel, dye and other lawful industries, *the title of which Act of Congress is 'National* Prohibition Act', and which act of Congress is commonly known as *'The Volstead Act'*, in that they would manufacture, possess, keep, barter, sell, transport, deliver, distribute, accept and receive intoxicating liquor and distilled spirits to wit, alcohol for beverage purposes, which said alcohol would then and there contain more than one-half of one per cent of alcohol by volume and would then and there be fit for use for beverage purposes, and specially denatured alcohol would then and there

> contain more than one-half of one per cent of alcohol by volume, contrary to and *otherwise than as authorized by the said National Prohibition Act.* * * *"

The Federal Court in charging the jury that tried the within defendant and the other defendants on the indictment above referred to said in part as follows:

> "So that this alleged conspiracy with which the defendants are charged, is a conspiracy, or an agreement made between them, *as it is claimed, to violate this United States law*, that is, the law, *the National Prohibition Act*, which provides for the manufacture and use and distribution of alcohol."

The Government in its brief in the criminal action in which the WATERLOO DISTILLING CORPORATION was found guilty of conspiracy to violate the National Prohibition Act, specifically referred to various sections in the National Prohibition Act, which were violated. The sections referred to in the National Prohibition Act, were Section 4 of Title 2 (Section 13, Title 27 U. S. C.), Section 29, Title 2 N. P. A. (Section 46, Title 27 U. S. C.), Section 15, Title 3 N. P. A. (Section 85, Title 27 U. S. C.), Section 13, Title 3 N. P. A. (Section 83, Title 27 U. S. C.).

Section 4 of Title 2 provides that denatured alcohol when produced and used as provided by law, shall not be subject to the provisions of the National Prohibition Act. Section 29 provides for a penalty of $500.00 whoever falsifies records.

Section 15 of Title 3 of the National Prohibition Act provides as follows:

> "Whoever operates an industrial alcohol plant or a denaturing plant without complying with the provisions of this title and lawful regulations made thereunder, or whoever withdraws or attempts to withdraw or secure tax free any alcohol subject to tax, or whoever otherwise violates any of the provisions of this title or regulations lawfully made thereunder shall be liable, for the first offense, to a penalty of not exceeding $1,000, or imprisonment not exceeding thirty days, or both, and for a second or cognate offense to a penalty of not less than $100 nor more than $10,000, and to imprisonment of not less than thirty days nor more than one year. It shall be lawful for the commissioner in all cases of second or cognate offense to refuse to issue for a period of one year a permit for the manufacture or use of alcohol upon the premises of any person responsible in any degree for the violation."

THE PROPERTY, BOTH REAL AND PERSONAL, OF THE DEFENDANT, WAS LIBELLED UNDER THE INTERNAL REVENUE LAWS (the Sections having been enumerated heretofore).

All Sections of the Revised Statutes above enumerated are statutes under Internal Revenue Laws and were in existence and in effect prior to the enactment of the National Prohibition Act.

Under the Act of March 3, 1927, Congress gave the Secretary of the Treasury the right to transfer from

the Collector of Internal Revenue to the Prohibition Commissioner all the rights, privileges, powers and duties heretofore imposed on the Commissioner of Internal Revenue by any law in respect of the taxation— or any other law relating to the enforcement of the Eighteenth Amendment.

Under Treasury Decision No. 1, the Secretary of the Treasury, pursuant to said Act of March 3, 1927, did transfer the powers heretofore imposed on the Collector of Internal Revenue to the Prohibition Commissioner only insofar as said duties and privileges applied to the enforcement of the National Prohibition Act, so that under the present laws and treasury decision the powers and duties heretofore imposed on the Collector of Internal Revenue now vest with the Prohibition Commissioner. *The question that arises is whether the Prohibition Commissioner has the right to invoke the Internal Revenue Laws to forfeit the property of the defendant where the defendant had previously been convicted and punished for violating the National Prohibition Act.*

Whether the Government has the power to proceed under either the Internal Revenue laws or the National Prohibition Act depends whether or not both laws are operative and run side by side and do not conflict. Subsequent to the enactment of the National Prohibition Act it was held that all Internal Revenue laws with regard to violations of manufacture and taxation of and traffic in intoxicating liquor had been superseded by the National Prohibition Act. (*United*

States vs. *Yugenovich*, 256 U. S. 450, decided June 1, 1921.)

On November 23rd, 1921, it was enacted that all prior Internal Revenue laws with regard to the manufacture and taxation of and traffic in intoxicating liquors were to continue in force except such provisions of such laws as are in direct conflict with the National Prohibition Act. The enactment is now Section 3 of Title 27 of U. S. C. A. and is as follows:

> "All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and penalties for violations of such laws that were in force on October 28, 1919, shall be and continue in force, as to both beverage and non-beverage liquor, *except such provisions of such laws as are directly in conflict with any provisions of this title;* but if any act is a violation of any such laws and also of this title, a conviction for such act or offense *under one shall be a bar to prosecution therefor under the other.*" (Nov. 23, 1921, c. 134, S. 5, 42 Stat. 223.) (Italics ours.)

The first question then as to whether or not the Government had the power to proceed to forfeit the property of the defendant under the Internal Revenue laws must be determined on the question as to whether or not said Internal Revenue Laws are in *conflict* with the National Prohibition Act.

The Willis-Campbell Act is clear and mandatory. It leaves no room for discretion on the part of the Prohibition Commissioner. If the Internal Revenue Laws

are in *conflict* with the National Prohibition Act, then the penalties to be inflicted on any violators must be those penalties as provided for in the National Prohibition Act and not the Internal Revenue laws.

On the other hand, if any part of the National Prohibition Act has been infringed upon or *violated*, subsequent prosecutions must be made by the Government, if made at all, under the National Prohibition Act.

This Court has considered this question in *Commercial Credit Company* vs. *United States of America*, 276 U. S. 226, decided on February 20, 1928. In that case a libel was brought by the United States under Section 3450 of the Revised Statutes of the Internal Revenue Laws to forfeit an automobile used in the removal, deposit and concealment of intoxicating liquor with the intent to defraud the United States of tax.

The doctrine of the Court was predicated upon the theory that the National Prohibition Act was in *conflict* with the Internal Revenue Laws. Adopting the same standing in the case at bar the Government likewise was barred from proceeding under the Internal Revenue Laws to bring the within libel for the reason that the Internal Revenue Laws are in conflict with the National Prohibition Act with regard to forfeiture of property.

The libel in the within case should have been dismissed on the following grounds:

1. That the provisions relating to penalties and forfeitures as incorporated in the National Prohibition

Act are in conflict with the Internal Revenue Laws, and

2. The WATERLOO DISTILLING CORPORATION having been prosecuted criminally under the National Prohibition Act, the Government is deemed to have elected the remedies it would pursue and is barred from bringing a forfeiture proceeding under the Internal Revenue Laws. (See Sec. 3 of Title 27 of U. S. C. A.)

The records which are on file in this Court show a prior conviction of the National Prohibition Act as outlined in the indictment and charge of the Court.

The Circuit Court of Appeals for the Fifth Circuit, in the case of *La Franca* vs. *United States of America*, decided that a criminal conviction under the National Prohibition Act, constitutes a complete bar to a subsequent prosecution, either civilly or criminally. This case was decided January 7th, 1930, and is now before this Court.

In *United States* vs. *Goldman*, 28 Fed. (2) 424, the defendants therein were indicted for conspiracy to violate the National Prohibition Act. Two of the defendants interposed a plea in bar, claiming immunity under Section 30, Title 2 of the National Prohibition Act, which provides that witnesses who testified in obedience to a subpoena shall not be subjected to any penalty or forfeiture, etc. The Government in that case demurred to the plea in bar contending that the prosecution was for conspiracy to violate the National Prohibition Act and not to violate the National Prohibition Act itself, and therefore the plea in bar could

not be invoked. The court held that the defendants could properly claim immunity because of the National Prohibition Act even though the charge was for a *conspiracy* to violate the National Prohibition Act and not for a violation of any part of the Act itself.

VI.

In any event, denatured alcohol is tax-free and there can be no forfeiture for alleged non-payment of tax on alcohol, after it is denatured.

> "The purpose of Title 3 of the National Prohibition Act, was to remove a number of restrictions placed on the manufacture of industrial alcohol that are deemed unnecessary, and to permit the Commissioner to substitute Regulations with the view of encouraging this very essential industry. 58 Congressional Record, 2293."

Title 3 of the National Prohibition Act was therefore drafted, so as to encourage the industries in which industrial alcohol is used.

Regulation 3 which went into effect August, 1927, were Regulations promulgated pursuant to Title 3, which relates to industrial alcohol.

Even prior to prohibition, Sections 481 and 482 of the Internal Revenue Laws provided that denatured alcohol was tax-free.

By Sections 481 and 482 of Title 26, we see that even in the years 1906 and 1907, alcohol when withdrawn for denaturization, was tax-free and became

tax-free after being distilled. The same principle is carried into the National Prohibition Act and the Regulations as above set forth.

Conclusion.

As this case involves questions of national importance in relation to the forfeiture and destruction of real and personal property, and for the other reasons mentioned herein, they are the proper ones for a review by this Court. The petition for the writ should therefore be granted.

Respectfully submitted,

LEWIS LANDES,
Solicitor for Petitioners.

(4016)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

No. 114

VARIOUS ITEMS OF PERSONAL PROPERTY, ETC., THE WATERLOO DISTILLING CORPORATION, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA.

BRIEF OF PETITIONERS.

LEWIS LANDES,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

No. 114

VARIOUS ITEMS OF PERSONAL PROPERTY, ETC., THE WATERLOO DISTILLING CORPORATION, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR THE DEFENDANTS, PETITIONERS.

Writ of Certiorari to a decree of the United States Circuit Court of Appeals for the Second Circuit, affirming a judgment of the United States District Court for the Western District of New York.

The decree of the Circuit Court of Appeals was entered on the 21st day of April, 1930.

Statement.

THE WATERLOO DISTILLING CORPORATION, a New York corporation, received permits from the Prohibition

Authorities to operate a distillery at Waterloo, New York, for the manufacture of alcohol, and to conduct a denaturing plant for the denaturation of alcohol (R., pp. 24-25). The Distillery filed with the Government, bonds of a Surety Company for $300,000 (R., pp. 24-25).

The Waterloo Distilling Corporation, and others, were convicted after a trial in the United States Court for the Western District of New York, on the 11th day of May 1928 for conspiracy to violate certain provisions of the National Prohibition Act (R., p. 21).

Subsequent to this conviction a libel was filed on the 17th day of September, 1928, in the Western District of New York (R., p. 2). Verified answers were interposed by the libellees (R., pp. 7-14).

On December 13, 1928, the issues were tried, and a verdict rendered in favor of the Government, on both counts in the libel (R., p. 172). Judgment was entered on the 31st day of January, 1929 (R., p. 19), forfeiting to the United States the real property of the distillery, and its apparatus, alcohol and articles listed in Schedules A and B of the libel.

Statutes Involved.

Section 3214 of the Revised Statutes is as follows:

> "No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner of Internal Revenue authorizes or sanctions the proceedings. Provided, That in case of any suit for penalties or forfeitures brought upon information received

from any person, other than a collector or deputy collector, the United States shall not be subject to any costs of suit."

Section 3247 of the Revised Statutes is as follows:

"Every person who produces distilled spirits, or who brews or makes mash, wort or wash, fit for distillation or for the production of spirits, or who by any process of evaporization, separates alcoholic spirit from any fermented substance, or who, making or keeping mash, wort or wash, has also in his possession or use a still, shall be regarded as a distiller."

Section 3257 of the Revised Statutes is as follows:

"Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises, and shall be fined not less than $500 and be imprisoned not less than six months nor more than three years."

Section 3281 of the Revised Statutes is as follows:

"Every person who carries on the business of a distiller without giving bond as required by law, or who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, shall, for every

such offense be fined not less than $1,000 nor more than $5,000, and imprisoned not less than six months nor more than two years. And all distilled spirits or wines, and all stills or other apparatus fit or intended to be used for distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title and interest therein of every such person, who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress, to or from such distillery, which shall be found in any such building, yard or inclosure, and all the right, title and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States."

Section 3287 of the Revised Statutes has to do with the method of withdrawing alcohol from the cistern into casks by a distiller, and need not be considered on this appeal.

Section 600-A of the Revenue Act of 1918, as amended, is as follows (Section 245, Title 26 U. S. C. A.):

> "S. 245. Tax on Distilled Spirits.—There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law. * * *
>
> (4) On and after February 26, 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person responsible for such diversion. If a tax at the rate of $2.20, $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph.

Libel.

The libel charged that between October 1, 1926, and March 1, 1927, the petitioners manufactured and shipped specially denatured alcohol, but entered on its records and reported to the Government that it manu-

factured and shipped completely denatured alcohol, thereby carrying on its business as a distillery, with the intent to defraud the United States of the tax imposed by Section 600-A of the Revenue Act of 1918 as amended, 26 U. S. C. A., Section 45, and thus making the property subject to forfeiture under Sections 3257 and 3281 of the Revised Statutes.

ARGUMENT.

I.

No tax was payable under Section 600-A of the Revenue Act for the reasons that distilled spirits were not diverted nor manufactured into an article used or intended for use as a beverage.

The libel is predicated upon the theory that the Waterloo Distilling Corporation entered on its records and reported to the Government that it manufactured and shipped completely denatured alcohol, whereas, it really manufactured and shipped specially denatured alcohol, thereby diverting this specially denatured alcohol to beverage purposes, and hence making same subject to tax at the beverage rate of $6.40 per proof gallon as provided for in Section 600-A of the Revenue Act of 1918 as amended February 26, 1926.

The Government's reasoning is absolutely fallacious, because Section 600-A as amended, provides a tax on distilled spirits diverted to beverage purposes, or on distilled spirits used in the manufacture of an "article" which is fit for beverage purposes, and which is diverted to such beverage purposes.

It is submitted that the manufacture and shipment of specially denatured alcohol, and the reporting that completely denatured alcohol was manufactured and shipped, instead, is merely a violation of the Regulations under the Prohibition Act, providing that proper records be made and kept, and that proper reports of operations be made to the Government. There is nothing in this whole record to show that the WATERLOO DISTILLING CORPORATION was connected with any plan whereby it was intended that the corporation or anyone else, was to extract the poison from this denatured product, making same fit for beverage purposes. On the contrary, the record, page 164, shows that the lower Court charged the Jury in effect that there was no such charge made by the Government nor any facts supporting same.

Denatured alcohol is not a distilled spirit, and is not fit for beverage purposes.

The Court in its charge to the Jury stated in part as follows:

> "In arriving at your conclusion on that point, I call your attention to the fact that there is no direct evidence in this case that any particular bit of this alcohol that went out of that plant was diverted to some particular place, and at that particular place used for beverage purposes." (R., p. 164, fol. 262.)

The Government chemist testified in part as follows:

> "I wouldn't say that specially denatured alcohol is fit for beverage purposes. Specially

> denatured alcohol is tax-free and completely denatured alcohol 5 is tax-free."

Denatured alcohol is defined by Regulations 61 promulgated by the Treasury Department and revised July, 1925, page 81, as follows:

> "Art. 88. Denatured alcohol is ethyl alcohol to which has been added such denaturing materials as render the alcohol unfit for use as an intoxicating beverage. It is free of tax and is solely for use in the arts and industries."
>
> * * * * * * *
>
> "Specially denatured alcohol is ethyl alcohol so treated with denaturants as to permit of its use in a greater number of specialized arts and industries than completely denatured alcohol. The character of the denaturant or denaturants is such that it may be sold, possessed, and used only pursuant to permit and bond except as otherwise provided herein."
>
> "Art. 89. Alcohol may be withwrawn free of tax for denaturation in an approved denaturing plant as hereinafter provided." * * *

The decision of this Court in Campbell *vs.* Long and Company, 281 U. S. 610, and Campbell *vs.* Galeno Chemical Co., 281 U. S. 599 (both dated May 26, 1930), made subsequent to the decision of Court below herein, *held that denatured alcohol, however treated, is not fit for beverage purposes.*

Mr. Justice Brandeis in his opinion said in part as follows:

> * * * "The permit held by plaintiffs authorize them to convert something which is undoubtedly liquor into a product which is required to be unfit for use as a beverage; that is, to convert liquor into something which is not liquor."

In the footnote of the Galeno case, Justice Brandeis further pointed out in his opinion as follows:

> * * * "Alcohol is unquestionably liquor. It is therefore urged that the same is true of any liquid, which, like alcohol, is immediately or mediately fit for use as a beverage and otherwise answers the definition of 'liquor.' Aside from the argument developed in the text, there are two short answers to this contention. First, alcohol is expressly included in the definition of 'liquor' in Sec. 1. No argument can, therefore, be based on the fact that pure alcohol is not immediately fit for use as a beverage. Second, there is no evidence whatever in the record that the plaintiffs' preparations can mediately be fitted for that purpose by the simple process of adding water—or by any other process."

In the Long case, footnote number 1, the Court defined specially denatured alcohol, by quoting Article 88, Regulations 61 of the Treasury Department and which appears hereinabove. In footnote number 7, Justice Brandeis also pointed out as follows:

> "We are not told what denaturants plaintiffs use; but we are asked to take judicial notice that denatured alcohol may be fitted for beverage purposes by extracting the denaturant. We may also take judicial notice that some

> denaturants can not be successfully extracted; and that any denaturants must be 'such that it can not be removed from the mixture and the treated product made fit for beverage purposes without great difficulty.' See 'Industrial Alcohol,' a monograph issued by the Treasury Dept., Bureau of Prohibition, p. 4 (Gov't Ptg. Office, 1930). *Moreover, from the standpoint of caution, denatured alcohol, however treated, is not fit for beverage purposes.*" (Italics ours.)

In Campbell *vs.* Galeno, *supra*, Mr. Justice Brandeis stated:

> "The Government contends that Sec. 1, Title II, of the Act defines the word 'liquor' as meaning not only the beverages specifically named but also any liquids 'containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes'; that liquids which are not immediately fit for use as beverages are yet 'fit for use for beverage purposes' if they can be made potable by a simple process" * * *.
>
> "We are not here concerned with the nature of the preparations in their varying states of development. Our concern is with the object of the permits. This object, and the permission granted, is not simply to manufacture varyingly unfinished products; but to manufacture specified articles containing whiskey, alcohol or other spirits. The spirits are, by Sec. 4, called 'articles' and are expressly excluded from the effect of the term 'liquor'. Moreover, Sec. 4 authorizes the issuance of permits for the use of whiskey, etc., in the

> manufacture of medicinal and other preparations only 'that are *unfit* for use for beverage purposes'; while 'liquor' is defined in Sec. 1 as meaning liquids, in addition to those enumerated, 'which are *fit* for use for beverage purposes.' The two definitions are mutually exclusive. If the article to be manufactured is fit for use for beverage purposes, and therefore liquor, a permit under Sec. 4 can not be issued; and *vice versa.*"

Section 600-A refers specifically to the "article". In the instant case the article in question is specially denatured alcohol, and *this Court in the opinion hereinabove referred to, has finally settled that denatured alcohol is not liquor, and is not fit for beverage purposes.* We therefore submit that inasmuch as the Government admits that distilled spirits were not diverted *as such* and merely relies on the reasoning that it was diverted by being used in the "article" and since the "article" in this case is specially denatured alcohol, this reasoning has now been overruled by the decision of this Court in the cases hereinabove quoted, to the effect that denatured alcohol is not liquor, and is not fit for beverage purposes.

The apparent intention of Section 600-A is to levy a tax upon an intoxicating liquor, and not upon denatured alcohol which is not intoxicating.

Section 600-A makes no reference to the possibility of recovering the distilled spirits, from the "article" manufactured.

Section 3047 of the Revised Statutes (Section 485; Title 26), specifically applies to such a situation, and is as follows:

> "any person * * * who shall recover or attempt to recover by redistillation or by any other process or means, any alcohol rendered unfit for beverage or liquid medicinal purposes under the provisions of this section * * * shall on conviction of each offense be fined no more than $5,000 * * * and shall in addition forfeit to the United States, all personal property used in connection with his business, together with the buildings and lots or parcels of ground constituting the premises on which such unlawful acts are performed or permitted to be performed."

While Section 3047 was not made the basis of this libel, yet the Government's claim rests entirely on the supposition that the poisons were intended to be removed from this denatured alcohol, thereby making same subject to the tax provision of Section 600-A. This despite the charge of the Court to the Jury, in effect, that there was no evidence offered by the Government supporting this supposition.

Further proof that subdivision 4 of Section 600-A relied upon in the libel was enacted for taxing only of intoxicating beverages and not denatured alcohol, or the recovery of the spirits therefrom, is evident from the date of the amendment, to wit, February 26, 1926, on which date Section 3047 of the Revised Statutes was in full force and effect.

Intoxicating liquor is defined in the National Prohibition Act, Section 1, Title 2, as follows:

> "When used in Title 2 and Title 3 of this Act, (1) the word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt or fermented liquor, liquids and compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes." * * *

The Circuit Court of Appeals in Higgins *vs.* Foster, *supra*, stated:

> "Section 6 uses the word 'liquor' which is defined by Section 1 of Title 2, and which seems to us clearly to be confined to beverages. It is true that it uses the word 'alcohol', but that, especially in its context precludes denatured alcohol, which is not potable." * * *

It is again pointed out to the Court that the position of the Government in the Long case, *supra*, is the same as that made in this case, namely, that because of the ease, as the Government contends, of extracting poisons from denatured alcohol, that same should be considered a liquor, notwithstanding the fact that liquor has been defined to the contrary in Section 1 of Title 2 of the National Prohibition Act. In the Long Company case the Government contended that denatured alcohol was equivalent to liquor, and hence subject to the same Regulations. Here, the position of the Government is, that denatured alcohol should be considered a distilled spirit, and therefore subject to tax.

This Court in the Long case did not agree with the above contention of the Government, and held that denatured alcohol, irrespective of the ease with which it might be cleaned, is not a liquor. It is the position of the Appellant in this case that it is likewise true, that denatured alcohol irrespective of the ease with which as claimed by the Government it may be cleaned or for that matter, irrespective of whether or not the denatured alcohol was sold in accordance with Regulations, is still not a distilled spirit, and not subject to any tax. Therefore, there can be no forfeiture of real and personal property, because of the non-payment of such tax.

II.

Sections 3257 and 3281 of the Internal Revenue laws cannot be invoked for the reason that there is no tax on the articles referred to in those sections as applied to this case.

THE WORD "TAX" MEANS PENALTY.

The National Prohibition Act specifically provides that denatured alcohol is not taxable (Section 4 N. P. A., Title 2). The purpose of the National Prohibition Act was to prevent illicit manufacture and sale of intoxicating liquor. It is not an Act for the purpose of raising revenue. There is no tax on denatured alcohol even if it is intended for beverage purposes. If there is no tax attached to denatured alcohol, there could be no fraud of revenue, and Sections 3281 and 3257 could not be invoked. Those sections are repealed by the National Prohibition Act.

In the case of United States against 2,000 cases of whiskey, etc., in October, 1921 (277 Fed. p. 410), the Court held that the Eighteenth Amendment of the National Prohibition Act completely changed the policy of the United States, and decided that Section 3453 of the Revised Statutes of the United States could not be invoked for the purpose of bringing a libel proceeding on the grounds of fraud of Internal Revenue, because there was no revenue of which the Government could be defrauded. The Circuit Court of Appeals said in part:

> "We are satisfied that the National Prohibition Act was not intended as a taxing measure in respect of intoxicating liquors for beverage purposes, but being a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes, it has elected its own machinery (as listed in Section 24, *supra,* and Title 2, Sec. 29), to accomplish the desired result.
>
> We are theerfore of the opinion that Section 3453 has been repealed and hence the decree below should be affirmed."

The libel was dismissed.

Since this case was decided, the Willis-Campbell Act sought to reenact all prior Internal Revenue Laws regarding taxes on intoxicating beverages not inconsistent with the National Prohibition Act. Assuming, but not granting, that Section 600-A does permit a tax on denatured alcohol, counsel urges that this tax would then be a penalty, and if a penalty, there could have been no fraud of revenue and again Sections 3257 and

3281, which provide for forfeiture in the event of fraud of revenue, could not have been invoked. This Court in Lipke *vs.* Lederer, 259 U. S., p. 557, said:

> "The mere fact that the Statute uses the word tax, does not make it a tax if from the general nature and intention of the Statute, it is seen that a penalty is meant."

Whether or not the word "tax" means a penalty, depends upon whether or not the statute is a punitive measure. In the Lipke case a so-called tax was levied on a violator of the National Prohibition Act, under Section 35 of that Act, which provides for a double tax with an additional penalty of $500.00 on retail dealers, and a thousand dollars on manufacturers who violate any of the terms of the National Prohibition Act. An attempt was made to forfeit the property both real and personal of the defendant, unless the tax imposed was paid.

Lipke, who was charged with violation of the National Prohibition Act, filed a bill and sought an injunction preventing the proposed action of the Government to confiscate his property, and the Supreme Court of the United States in deciding the question, held that the mere use of the word "tax" is not enough to show that within the true intendment of the term, a tax was laid, when by the very nature of the imposition a penalty was meant.

In Regal Drug Corporation *vs.* Wardell, 260 U. S. 387, the Court said:

> "Since the decision of the Circuit Court of Appeals we have decided a case which is a neces-

> sary factor to be considered (Referring to Lipke *vs.* Lederer, quoted *supra*). * * *
>
> The distinction between a tax and a penalty was emphasized. The function of a tax, it was said, 'is to provide for the support of the Government': the function of a penalty clearly involves the 'idea of punishment for infringement of the law; and that a condition of its imposition is notice and hearing.' "

Section 609 (Section 506, Title 26, Internal Revenue) provides for a tax of $6.00 for every barrel of fermented liquor brewed, manufactured, sold or removed for consumption or sale. In construing that section which was also reenacted by the Willis-Campbell Act in November, 1921, it has been held that the word "tax" mentioned in said section, means penalty. U. S. *vs.* American Brewing Co., 296 Fed. 772, decided in 1924; U. S. *vs.* 2,615 Barrels, 1 Fed. (2d) 500, decided in 1924.

In U. S. *vs.* American Brewing Co., *supra,* the Court said in part:

> "We are clearly of opinion that for several reasons the provisions of the Internal Revenue Laws do not apply to any of these cases, and these libels and search warrants must stand or fall under the authority of the National Prohibition Act. The authorization of warrants of search and seizure under the Internal Revenue Laws and Sections 3340 and 3450 of the Revised Statutes (Comp. St. SS 6146, 6352), dealing with the forfeiture of property, are solely in aid of the collection of taxes. But the so-called tax imposed by Section 608 of the Act of February

> 24, 1919 (Comp. St. Ann. Supp. 1919, S. 6144*bb*), re-enacted in 1921, is clearly a penalty and not a tax. The decisions of the Supreme Court are conclusive as to this. Helwig *vs.* U. S., 188 U. S. 605, 23 Sup. Ct. 427, 47 L. Ed. 614; Lipke *vs.* Lederer, 259 U. S. 557, 42 Sup. Ct. 549, 66 L. Ed. 1061; Regal Drug Corporation *vs.* Wardell, 260 U. S. 386, 43 Sup. Ct. 152, 67 L. Ed. 318."

U. S. *vs.* 2,615 Barrels, *supra*, in referring to Section 608 of the Revised Statutes, the Court held as follows:

> "We are clearly of the opinion that for several reasons the provisions of the internal revenue laws do not apply to any of these cases, and that these libels and search warrants must stand or fall under the authority of the National Prohibition Act. The authorization of warrants of search and seizure under the internal revenue laws and sections 3340 and 3450 of the Revised Statutes (Comp. St. sections 6146, 6352), dealing with the forfeiture of property, are solely in aid of the collection of taxes. But the so-called tax imposed by section 608 of the Act of February 24, 1919 (Comp. St. Ann. Supp. 1919, sections 6144 *bb*), re-enacted in 1921, is clearly a penalty and not a tax. The decisions of the Supreme Court are conclusive as to this"—referring to Helwig *v.* United States, 188 U. S. 605, 23 Sup. Ct. 427, 46 L. Ed. 614, Lipke *v.* Lederer, 259 U. S. 560, 42 Sup. Ct. 549, 65 L. Ed. 1061, and Regal Drug Corporation *v.* Wardell, 260 U. S. 386, 43 Sup. Ct. 152, 67 L. Ed. 318. * * *
>
> "Cases like the present will be disposed of, as was clearly intended by Congress in the enactment of the National Prohibition Act and its supplements, without regard to the effort, as was

> said, to bolster *under the revenue statutes*, since we remain of the opinion as heretofore expressed in United States *v.* Spencer *et al.*, 292 Fed. 871, that 'it was no doubt intended that the National Prohibition Act should furnish a full, complete, and adequate remedy for the enforcement of national prohibition, and it is not unreasonable that those employed for that purpose should be confined to the means and remedies thereby afforded to accomplish this end.' And it might be added that under its provisions we believe adequate, full, and complete justice can be meted out in the enforcement of the Eighteenth Amendment." (Italics ours.)

The taxes referred to in Sections 600-A and 608 of the Revised Statutes which were repealed by the National Prohibition Act, as held in the Yuginovich case decided by this Court and which were reenacted by the Willis-Campbell Act of November 23rd, 1921, does not necessarily mean that the taxes which were in effect prior to prohibition, now may be considered as taxes.

III.

Section 3257 of the Internal Revenue Laws, and Section 25, Title II, of the National Prohibition Act, are in direct conflict, and under the Willis-Campbell Act, a prosecution, if the two laws conflict, must be brought under the National Prohibition Act.

Section 3257 is the basis for count 2 of the libel.

Section 25 of Title 2, N. P. A., provides as follows:

> "It shall be unlawful to have or possess any liquor or property designed for the manufacture

of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the Court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the Court shall otherwise order. No such warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied, not transiently but solely as a residence in an apartment house, hotel, or boarding house.

The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process."

If Section 25 of Title 2, N. P. A., and 3257 are in direct conflict, then under the Willis-Campbell Act, 3257 remains repealed. Both sections refer to liquor. Both sections refer to personal property, and although the word, "property" is used in Section 25 of Title 2, personal property is meant for the reason that reference is made to a replevy of said property. Under Section 25, a seizure must be made by means of a

search warrant, and under Section 3257, no search warrant is required to seize the personal property contained in the distillery.

Under Section 3257, the property seized and forfeited, becomes confiscated to the Government, and in addition thereto, the person who carries on the distillery is subjected to a fine and imprisonment. No such provision is made in Section 25 of Title 2. On the contrary, under Section 25 of Title 2, the liquor or property seized is subject to the disposition of the Court only. A discretionary power is vested in the Court to dispose of the property, as the best interests of justice may require. Under Section 3257 of the Revised Statutes, the property becomes confiscated to the Government, and can be sold by the Government. Under Section 25 of Title 2, the property seized which was designed for the unlawful manufacture of liquor, must be destroyed, unless the Court otherwise orders. These two sections undoubtedly are in direct conflict and using the same line of reasoning, as contained in the Commercial Credit Co. *vs.* The United States, *infra*, it would appear that if any proceeding at all was taken by the Government, it was compelled to act under Section 25 of Title 2, instead of Section 3257.

In Commercial Credit Co. *vs.* U. S., 276 U. S., page 226, decided on February 20th, 1928, this Court, analyzing the Internal Revenue Law under which a vehicle was forfeited, and Section 26, Title 2 of the National Prohibition Act which also provides for forfeiture of vehicles, held that an essential distinction existed between the two sections, and dismissed the libel, on the

grounds that there was a direct conflict between the two sections.

In United States *vs.* 63,250 Gallons of Beer, 13 Fed. (2d), p. 242, Section 25 of Title 2 was construed to refer to personal property only, and not to realty. The Court said in part:

> "'Section 25 of the National Prohibition Act is to be read in connection with the Espionage Act, which it incorporates. It relates to property which is movable, and can be disposed of as movable property by destruction or return, and which could be made the subject of replevin proceedings. Real estate and things annexed to real estate are not within its purview, but are to be dealt with under Section 22 of that act, in connection with the use of the premises.'
>
> "The same conclusion has been reached in other jurisdictions. See Mellet & Nichter Brewing Co. *vs.* U. S. (D. C.), 296 F. 765; U. S. *vs.* American Brewing Co. (D. C.), 296 F. 772-777."

IV.

Section 22 of the National Prohibition Act and Section 3281 of the Internal Revenue Laws are in direct conflict.

Section 3281 provides for the forfeiture of real property and for the forfeiture of any interest that a person may have in the lot or tract of land on which the distillery is situated who knowingly permitted such acts to be done as to defraud or attempt to defraud the United States, of taxes.

Section 22 of Title 2 does not provide for the forfeiture of real property. It is not so drastic as Section 3281. It declares that an action to enjoin a nuisance may be brought where any house, room or building or place is used in violation of the National Prohibition Act, and that the premises may be padlocked. It also provides that leases may be forfeited at the option of the lessor, where the tenant has violated the National Prohibition Act. No provision is made with respect to innocent parties with respect to padlocking the premises. Under Section 22 of Title 2, it makes no difference whether the landlord had knowledge of the violations occurring in his premises. The place may be padlocked, irrespective of his knowledge or consent.

Section 3281 only permits the forfeiture of real property where there is knowledge and intention on the part of the person with respect to the violations. In other words, under Section 3281 of the Revised Statutes, innocent owners of real property, are apparently protected. Under Section 3281, if the owner of the property did not know that the lessee was committing a crime, his premises cannot be forfeited.

Under Section 22 of the National Prohibition Act, the premises may be padlocked irrespective of the owner's or landlord's innocence. There is an apparent conflict therefore, between Section 22 of the National Prohibition Act and Section 3281 of the Internal Revenue Laws, and if any proceedings at all were brought, with relation to the real property owned by the Waterloo Distilling Corporation, they should have been brought under the National Prohibition Act, to padlock

the premises for a period of one year. Section 3281 of the Revised Statutes cannot be applicable, for the reason that there are no taxes on distilled spirits of which the Government can be defrauded. This apparently is the reason why the drastic punishment of confiscation was not carried over into the National Prohibition Act, and explains the reason for the conflicting penalties provided for in the event a distiller does not comply with the laws.

It was held *In re* Crescent Beverage Co., decided August 2, 1923, 297 Fed. p. 1009, that the real property can be seized and disposed of by the Government only as provided for in Section 22 of Title 2. The Court in that case held in part, as follows:

> "The right of the petitioner to conduct its plant had been recognized by the Bureau of Internal Revenue, and hence the seizure of its building, machinery and product in course of manufacture had no lawful foundation whatsoever. But, even if a proper foundation for a seizure had existed, the seizure of the premises could not properly be made by virtue of a search warrant. Section 22, Title 2 of the National Prohibition Act (Comp. St. Ann. Supp., 123, S. 10138½*k*), prescribes the method by which the brewery premises may be taken from the possession of the owner. Section 25 of the same act (Comp. St. Ann. Supp. 1923, S. 10138½*m*), and Title II of Public Law No. 24 of the 65th Congress, approved June 15, 1917 (40 Stat. p. 228 Comp. St. 1918 Comp. St. Ann. Supp. 1919, S. 10496½ a *et seq.*), prescribed the practice after seizure upon search warrant, and was not observed in the present case. We are of the opin-

ion that the seizure of the premises, machinery and product in course of manufacture was without warrant of law, and think it is our duty in the premises to make an order for the return thereof."

Again the same conclusion was reached in U. S. *vs.* 63,250 Gallons of Beer, 13 Fed. (2d), p. 242, wherein the Court also stated that real estate is not within the purview of Section 25 of the National Prohibition Act, but must be dealt with under Section 22. Both cases above quoted were decided subsequent to the enactment of the Willis-Campbell Act on November 23rd, 1921, and the Courts held in both cases, that the National Prohibition Act must be followed, in the event any proceeding is taken with reference to the forfeiture of real or personal property.

V.

The Waterloo Distilling Corporation having been indicted and convicted together with others for conspiracy to violate the National Prohibition Act, penalties or suits for forfeitures because of said violations must be pursued under the National Prohibition Act on the theory that the Government having elected to indict and convict for violation of the National Prohibition Act is barred from making any further prosecutions under the Internal Revenue Laws.

THE WATERLOO DISTILLING CORPORATION WAS CONVICTED FOR VIOLATING THE NATIONAL PROHIBITION ACT.

THE WATERLOO DISTILLING CORPORATION, together with several other defendants, was indicted by the

Grand Jury of the United States at a term of the District Court of the United States for the Western District of New York, for conspiracy to violate the terms of the National Prohibition Act, and the defendant corporation was found guilty of such violations and directed to pay a fine of $10,000.00 on June 2, 1928. The indictment against the defendant reads in part as follows, to wit, that the defendants

> "Knowingly, wilfully, unlawfully and feloniously did conspire, combine, confederate and agree together and with one and another and each with the other, and with divers other persons to said Grand Jurors unknown,—to wit; to knowingly, wilfully, unlawfully and feloniously violate the terms and provisions of an Act of Congress of October 28th, 1919, entitled an act to prohibit intoxicating beverages and to regulate the manufacture, production and use and sale of high proof spirits for other than beverage purposes and insure an ample supply of alcohol and promote the use in scientific research and in the development of fuel, dye and other lawful industries, the title of which Act of Congress is 'National Prohibition Act', and which act of Congress is commonly known as 'The Volstead Act', in that they would manufacture, possess, keep, barter, sell, transport, deliver, distribute, accept and receive intoxicating liquor and distilled spirits, to wit, alcohol for beverage purposes, which said alcohol would then and there contain more than one-half of one per cent of alcohol by volume and would then and there be fit for use for beverage purposes, and specially denatured alcohol would then and there contain more than one-half of one per cent of alcohol by volume,

> contrary to and otherwise than as authorized by the said National Prohibition Act. * * *"

The Court in charging the Jury that tried the within petitioner and the others on the indictment above referred to, said in part as follows:

> "So that this alleged conspiracy with which the defendants are charged, is a conspiracy, or an agreement made between them, as it is claimed, to violate this United States Act, that is the law, the National Prohibition Act, which provides for the manufacture and use and distribution of alcohol."

The Government in its brief in the criminal action in which the Waterloo Distilling Corporation was found guilty of conspiracy to violate the National Prohibition Act, specifically referred to various sections in the National Prohibition Act, which were violated. The sections referred to in the National Prohibition Act were Section 4 of Title 2 (Section 13, Title 27, U. S. C.), Section 29, Title 2, N. P. A. (Section 46, Title 27, U. S. C.), Section 15, Title 3, N. P. A. (Section 85, Title 27, U. S. C.), Section 13, Title 3, N. P. A. (Section 83, Title 27, U. S. C.).

Section 4 of Title 2 provides that denatured alcohol when produced and used as provided by law, shall not be subject to the provisions of the National Prohibition Act. Section 29 provides for a penalty of $500.00 for making of false records.

Section 15 of Title 3 of the National Prohibition Act provides as follows:

> "Whoever operates an industrial alcohol plant or a denaturing plant without complying

with the provisions of this title and lawful regulations made thereunder, or whoever withdraws or attempts to withdraw or secure tax free any alcohol subject to tax, or whoever otherwise violates any of the provisions of this title or regulations lawfully made thereunder shall be liable, for the first offense, to a penalty of not exceeding $1,000, or imprisonment not exceeding thirty days, or both, and for a second or cognate offense to a penalty of not less than $100 nor more than $10,000, and to imprisonment of not less than thirty days nor more than one year. It shall be lawful for the commissioner in all cases of second or cognate offenses to refuse to issue for a period of one year a permit for the manufacture or use of alcohol upon the premises of any person responsible in any degree for the violation."

THE PROPERTY, BOTH REAL AND PERSONAL, OF THE DEFENDANT WAS LIBELLED UNDER THE INTERNAL REVENUE LAWS (the Sections having been enumerated heretofore).

All Sections of the Revised Statutes above enumerated are statutes under Internal Revenue Laws and were in existence and in effect prior to the enactment of the National Prohibition Act.

Under the Act of March 3, 1927, Congress gave the Secretary of the Treasury the right to transfer from the Collector of Internal Revenue to the Prohibition Commissioner all the rights, privileges, powers and duties heretofore imposed on the Commissioner of Internal Revenue by any law in respect of the taxation—or any other law relating to the enforcement of the Eighteenth Amendment.

Under Treasury Decision No. 1, the Secretary of the Treasury, pursuant to said Act of March 3, 1927, did transfer the powers heretofore imposed on the Collector of Internal Revenue to the Prohibition Commissioner only insofar as said duties and privileges applied to the enforcement of the National Prohibition Act, so that under the present laws and treasury decisions, the powers and duties heretofore imposed on the Collector of Internal Revenue now vest with the Prohibition Commissioner. The question that arises is whether the Prohibition Commissioner has the right to invoke the Internal Revenue Laws to forfeit the property of the defendant where the defendant had previously been convicted and punished for violating the National Prohibition Act.

Whether the Government has the power to proceed under either the Internal Revenue Laws or the National Prohibition Act depends whether or not both laws are operative and run side by side and do not conflict. Subsequent to the enactment of the National Prohibition Act it was held that all Internal Revenue Laws with regard to violations of manufacture and taxation of and traffic in intoxicating liquor had been superseded by the National Prohibition Act. United States *vs.* Yugenovich, 256 U. S. 450, decided June 1, 1921.

On November 23rd, 1921, it was enacted that all prior Internal Revenue Laws with regard to the manufacture and taxation of and traffic in intoxicating liquors were to continue in force except such provisions of such laws as are in direct conflict with the

National Prohibition Act. The enactment is now Section 3 of Title 27 of U. S. C. A. and is as follows:

> "All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and penalties for violations of such laws that were in force, on October 28, 1919, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provisions of this title; but if any act is a violation of any such laws and also of this title, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other." (Nov. 23, 1921, c. 134 S. 5, 42 Stat. 223.)

Whether or not the Government had the power to forfeit the property of the defendant under the Internal Revenue Laws must be determined by the fact as to whether or not said Internal Revenue Laws are in conflict with the National Prohibition Act.

The Willis-Campbell Act is clear and mandatory. It leaves no room for discretion on the part of the Prohibition Commissioner. If the Internal Revenue Laws are in conflict with the National Prohibition Act, then the penalties to be inflicted on any violators must be those penalties as provided for in the National Prohibition Act and not the Internal Revenue Laws.

Furthermore, if any part of the National Prohibition Act has been violated and a conviction secured thereon, subsequent prosecutions for the same acts, if made at all, must be made by the Government, under the National Prohibition Act.

This Court has considered this question in Commercial Credit Company *vs.* United States of America, 276 U. S. 226, decided on February 20, 1928. In that case a libel was brought by the United States under Section 3450 of the Revised Statutes of the Internal Revenue Laws to forfeit an automobile used in the removal, deposit and concealment of intoxicating liquor with the intent to defraud the United States of tax. The Court ruled against the Government, and held practically, that a prosecution under the National Prohibition Act bars further prosecutions under the Internal Revenue Statutes.

We therefore submit that in the case at bar the Government likewise was barred from proceeding under the Internal Revenue Laws to bring the within libel.

The libel in the within case should have been dismissed on the following grounds:

1. That the provisions relating to penalties and forfeitures as incorporated in the National Prohibition Act are in conflict with the Internal Revenue Laws, and

2. The Waterloo Distilling Corporation having been prosecuted criminally under the National Prohibition Act, the Government is deemed to have elected the remedies it would pursue and is barred from bringing a forfeiture proceeding under the Internal Revenue Laws. (See Sec. 3 of Title 27 of U. S. C. A.) See U. S. *vs.* Waterloo and others decided in this Court.

In United States *vs.* Goldman, 28 Fed. (2) 424, the defendants therein were indicted for conspiracy to

violate the National Prohibition Act. Two of the defendants interposed a plea in bar, claiming immunity under Section 30, Title 2 of the National Prohibition Act, which provides that witnesses who testified in obedience to a subpœna shall not be subjected to any penalty or forfeiture, etc. The Government in that case demurred to the plea in bar, contending that the prosecution was for conspiracy to violate the National Prohibition Act and not to violate the National Prohibition Act itself, and therefore the plea in bar could not be invoked. The Court held that the defendants could properly claim immunity because of the National Prohibition Act even though the charge was for a conspiracy to violate the National Prohibition Act and not for a violation of any part of the Act itself.

U. S. *vs.* McKee (Federal cases 15,688), is on all fours with the case at bar. This case was quoted by this Court in Coffey *vs.* U. S. 116 U. S. 445, and is as follows:

> "The defendant had been convicted and punished under a section of the Revised Statutes for conspiring with certain distillers to defraud the United States by unlawfully removing distilled spirits without payment of the taxes thereon. He was afterwards sued in a civil action by the United States under another section, to recover a penalty of double the amount of the taxes lost by the conspiracy and fraud. The two alleged transactions were but one, and it was held that the suit for the penalty was barred by the judgment in the criminal case. The decision was put on the ground that the defendant could not be

> twice punished for the same crime, and that the former conviction and judgment were a bar to the suit for penalty."

In Thomas and Vincent Murphy *vs.* United States, 272 U. S. 630 (71 L. Ed. 446), it was held as follows:

> "If we are right as to the purpose of section 22, the decree in the present case did not impose a punishment for the crime for which the appellants were acquitted in the former judgment. That it did impose a punishment is the only ground on which the former judgment would be a bar."

It will be observed from the above quoted decision that by analogy the Court held that if the defendants had been prosecuted for a penalty under the Prohibition Act, as in this case, its judgment would have been different.

The Government's contention in the District Court, that these penalties are cumulative, and therefore can be imposed to defeat the protection given to the people by the Fifth Amendment of the Constitution (not to be prosecuted more than once for the same offense) is purely fanciful and not based on sound legal principles.

We strenuously deny that the penalties sued on are cumulative with the penalties under the National Prohibition Act, but assuming that the penalties are cumulative, the result sought to be accomplished by the Government can never be obtained without violation of Constitutional privileges.

VI.

Real and personal property not bonded and not part of the distillery premises was not subject to forfeiture.

Regulations 61 provide that an applicant for a permit to conduct a distillery and bonded warehouse shall describe the specific property to be used for such purposes, with the same detail as in a deed to such property. The Regulations explain that this is important because the Government acquires important rights in such specific property, and among other rights, it mentions the right of forfeiture. In the instant case the Waterloo Distilling Corporation owned property, both real and personal, in addition to the property described in such application for the distilling premises. The specific premises covered by the permit was described in detail in the permit, and also covered by a map filed

We submit that the property not covered by the permit for distilling operations was not subject to forfeiture, merely, because it was owned by the Waterloo Distilling Corporation at the time of these alleged violations.

In Edward Ryan *vs.* U. S. of America, Circuit Court of Appeals, 9 Circuit Number 6184, decided November 17, 1930, and which appeared in the U. S. Daily 2154 dated December 16, 1930, the Circuit Court held in effect that there can be no forfeiture of any property, unless used, where the untaxed liquor was manufactured. In the case at bar the unbonded premises is an island and, while adjacent to the distillery premises on the mainland, is not used as a means of ingress and

egress, being entirely separate and distinct from such distillery premises.

This island does not appear in the map covered by the application for the distillery on file with the Government, and part of this record, and is not described in the permit covering the distillery premises issued to the Waterloo Distilling Corporation.

VII.

Without intending to waive any of the other assignments of errors and the exceptions appearing in the record, in order to avoid the expansion of this brief, the petitioner nevertheless commends them to the consideration of the Court as enforcing the various points above argued.

Conclusion.

It is respectfully submitted that the decree of the United States Circuit Court of Appeals should be reversed.

Respectfully submitted,

LEWIS LANDES,
Solicitor for Petitioners.

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No. 114

In the Supreme Court of the United States

OCTOBER TERM, 1930

VARIOUS ITEMS OF PERSONAL PROPERTY, ETC., THE WATERLOO DISTILLING CORPORATION ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 324) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 21, 1930. (R. 330.) The petition for certiorari was filed May 14, 1930. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether alcohol which has been diverted to beverage purposes after having been specially denatured to facilitate such diversion is subject to the tax imposed by Section 600 (a) (4) of the Revenue Act of 1918, as amended, upon distilled spirits diverted to beverage purposes.

2. Whether such "tax" is a penalty and, therefore, not within the contemplation of Sections 3257 and 3281 of the Revised Statutes, which provide for the forfeiture of the distillery of any distiller who defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or who engages in such business with intent to defraud the United States of such tax.

3. Whether Sections 3257 and 3281 of the Revised Statutes are directly in conflict with Sections 25 and 22, Title II, of the National Prohibition Act and, therefore, impliedly repealed by that Act.

4. Whether a prior conviction of the distiller of conspiracy to violate the National Prohibition Act bars the present suit to forfeit the distillery.

STATUTES INVOLVED

Section 3257 of the Revised Statutes (U. S. C., Title 26, Sec. 261) provides:

> Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling-apparatus used by him, and

all distilled spirits and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years.

Section 3281 of the Revised Statutes (U. S. C., Title 26, Sec. 306) provides:

Every person who carries on the business of a distiller without having given bond as required by law, or who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, shall, for every such offense, be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years. And all distilled spirits or wines, and all stills or other apparatus fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person, who knowingly has suffered or permitted the business of a distiller to be

there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or inclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.

Section 600 (a) of the Revenue Act of 1918, as amended (c. 27, Sec. 900, 44 Stat. 9, 104; U. S. C., Title 26, Sec. 245), provides, so far as material here:

SEC. 600. (a) There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law:

(1) Until January 1, 1927, $2.20 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon;

* * * * *

(4) On and after the enactment of the Revenue Act of 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person responsible for such diversion. If a tax at the rate of $2.20, $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph.

Section 5 of the Willis-Campbell Act, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3), provides:

That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35 of Title II of the

National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

STATEMENT

This was a libel by the United States to forfeit a distillery, warehouse, and denaturing plant at Waterloo, New York. The libel charged in its first and second counts that between October 1, 1926, and March 1, 1927, the Waterloo Distilling Corporation had carried on the business of a distiller upon the libeled premises with intent to defraud the United States of the tax on the spirits distilled; that during the same period the said corporation had attempted to defraud and had defrauded the United States of such tax, and that in consequence of said acts the property libeled had become forfeited to the United States under Sections 3281 and 3257 of the Revised Statutes. The fraud alleged consisted of the withdrawal of alcohol, ostensibly for nonbeverage but actually for beverage purposes, without payment of the tax imposed by Section 600 (a) of the Revenue Act of 1918, as amended, upon distilled spirits diverted to beverage purposes. (R. 3–9.) A third count, drawn under Section 3453 of the Revised Statutes, was dismissed on stipulation. (R. 9–11, 38.) Answers to the libel were filed by the Waterloo Distilling Corporation, the Seneca Solvents & Chemical Corporation, Max Rein and Fannie Rein, the peti-

tioners, the last three claiming title to parts of the libeled property under deeds from the Waterloo Distilling Corporation. (R. 14–31.)

After the jury was sworn but before the taking of testimony, counsel for the respondents moved to dismiss the libel on the ground that the Government had previously elected to proceed against the Waterloo Distilling Corporation and others upon the charge of conspiracy to violate the National Prohibition Act (see *United States* v. *Austin-Bagley Corporation*, 31 F. (2d) 229) and was accordingly barred from proceeding in the present case to forfeit the property of that corporation under the internal revenue laws. The motion was denied and an exception noted. (R. 45–46.) At the trial the Government introduced evidence to show that during the period from October, 1926, to March, 1927, the Waterloo Distilling Corporation was operating an industrial alcohol plant, a bonded warehouse and a denaturing plant at Waterloo, New York, under Government permits (R. 48–52); that during that period it had withdrawn large quantities of alcohol from its bonded warehouse ostensibly for complete denaturation at its denaturing plant, but that it had in fact only specially denatured such alcohol and had thereupon shipped it under false billings to fictitious consignees (R. 83–92: 151–152).

The jury returned a verdict in favor of the libelant (R. 275) and judgment was entered declaring

the libeled property forfeited to the United States (R. 39–41). Upon appeal the judgment was affirmed. (R. 330.) Certiorari is asked on the grounds: (1) That the article diverted was not "distilled spirits," but was denatured alcohol, which is not subject to tax, and that Section 600 (a) had no application in this case; (2) that under the decisions of this Court in *Lipke* v. *Lederer*, 259 U. S. 557, and *Regal Drug Corporation* v. *Wardell*, 260 U. S. 386, the "tax" imposed by Section 600 (a) upon distilled spirits diverted to beverage purposes is in reality a *penalty* and, therefore, the provisions of Sections 3257 and 3281 of the Revised Statutes, forfeiting property of a distiller who defrauds or attempts to defraud the United States of a *tax*, or who engages in such business with intent to defraud the United States of a *tax*, had no application to such penalty; (3) that Sections 3257 and 3281 of the Revised Statutes are respectively in direct conflict with Sections 25 and 22, Title II, of the National Prohibition Act, and were therefore impliedly repealed by that Act; and (4) that as the Waterloo Distilling Corporation and others had previously been indicted and convicted on the charge of conspiring to violate the National Prohibition Act because of the transactions involved in the instant case, the Government was barred by Section 5 of the Willis-Campbell Act from proceeding to forfeit the distillery of that company.

ARGUMENT

I

THE ARTICLE DIVERTED TO BEVERAGE PURPOSES WAS DISTILLED SPIRITS SUBJECT TO TAX UNDER SECTION 600 (a) (4) OF THE REVENUE ACT OF 1918, AS AMENDED

Because the pure alcohol which was withdrawn by the distiller from its bonded warehouse was specially denatured before being disposed of to purchasers with the object, as must be presumed to have been found by the jury, that it should be "cleaned" and ultimately used for beverage purposes, the petitioners contend that the diversion was not of "distilled spirits" but of denatured alcohol and that the tax imposed by Section 600 (a) (4) of the Revenue Act of 1918, as amended, accordingly did not apply. We submit that the diversion to beverage purposes began when the alcohol was withdrawn with the intent that it should ultimately be used for such purposes and that the denaturation was but a step in such diversion.

II

THE TAX IMPOSED IN THIS CASE UNDER SECTION 600 (A) OF THE REVENUE ACT OF 1918, AS AMENDED, IS WITHIN THE CONTEMPLATION OF SECTIONS 3257 AND 3281 OF THE REVISED STATUTES

Petitioners cite *Lipke* v. *Lederer*, 259 U. S. 557, and *Regal Drug Co.* v. *Wardell*, 260 U. S. 386, as establishing that the "tax" imposed by Section 600 (a) of the Revenue Act of 1918, as amended, is in reality a "penalty" and from this they argue that the defrauding or attempting to defraud of

such tax by a distiller, or the engaging in the business of a distiller with the attempt to defraud thereof, are acts not within the contemplation of Sections 3257 and 3281 of the Revised Statutes.

The cases cited lay down the rule that where a "tax" is imposed upon dealings which are made criminal by law and the essential purpose of the "tax" is that of "punishment for infraction of the law" such an imposition, though called a tax, is in reality a penalty and can not be lawfully collected by distraint upon an assessment made without notice and hearing given the person called upon to pay it. Within this rule the *Lipke case* held that the so-called "double tax" imposed by Section 35, Title II, of the National Prohibition Act upon the illegal manufacture or sale of liquor is a penalty rather than a tax.

The same conclusion was reached in the *Regal Drug Co. case* with respect to the tax of $6.40 imposed by Section 600 (a) of the Revenue Act of 1918, *but only in so far as the tax of $6.40 exceeded the basic tax of $2.20 imposed by that section.* Section 600 (a) imposed a tax of $2.20 per gallon "on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States." (C. 18, 40 Stat. 1057, 1105.) In the *Regal Drug Co. case* this tax of $2.20 had been paid by the distiller (260 U. S. 386, 388, 389; see also the record in that case, No. 108, October Term, 1922, pp. 4–5, 7), and the taxing authorities were only endeavoring

to collect the sum of $4.20 per gallon, the difference between the tax paid upon the lawful withdrawal of the distilled spirits and the total tax of $6.40 imposed by Section 600 (a) when the distilled spirits were diverted to beverage purposes.

In the instant case no taxes under Section 600 (a) have been paid and the amount charged by the taxing authorities against the petitioners is the entire tax of $6.40. This sum by the express terms of Section 600 (a) (4) includes the underlying or basic tax of $2.20 which is exacted *for dealings which may be permissible and lawful.* Neither the *Lipke case* nor the *Regal Drug Co. case* decides that *this* part of the sum of $6.40 is not a real tax. While there may be some doubt as to the limits of the rule of the *Lipke* and *Regal Drug Co. cases,* in view of the subsequent statements of this Court that "a tax on intoxicating liquor does not cease to be such because the sovereign has declared that none shall be manufactured, and because the main purpose in retaining the tax is to make law-breaking less profitable" (*United States* v. *One Ford Coupe,* 272 U. S. 321, 326–327; *Murphy* v. *United States,* 279 U. S. 630, 631–632), it is submitted that to the extent that the total tax set forth in Section 600 (a) (4) represents an imposition upon lawful, permissible dealings, it is a real tax and not a penalty. It was expressly so held in *United States* v. *One Ford Coupe, supra,* p. 328.

Since the "tax" upon which the present forfeiture proceedings are based includes the basic,

underlying tax which is imposed upon all the dealings described, lawful as well as unlawful, a portion, at least, of the impositions here involved is a real tax and hence within the provisions of Sections 3257 and 3281 of the Revised Statutes.

In *United States* v. *One Ford Coupe, supra,* pp. 328–329, this Court said with reference to the impositions here involved:

> With respect to the character of the impositions called taxes there is nothing in either the Revenue Acts or the Prohibition Act which makes any distinction between the product of legal and illegal distillation. The Acts left in effect the basic tax of $2.20 per gallon, *which was and is a true tax on the product, whether legally or illegally distilled,* and added to it the additional amounts in case of illegal distillation or diversion to illegal uses. These additional amounts also are called taxes by Congress, and were understood by it to be such. Whether they were intrinsically penalties and should be treated as such we need not determine. The basic tax of $2.20 a gallon on liquor illegally produced is not imposed because of illegality, but despite of it. It is a tax within the meaning of § 3450. (Italics ours.)

Thus, in this case, the basic tax of $2.20 a gallon is a tax within the meaning of Sections 3257 and 3281 and it is not necessary to consider whether the additional amounts called taxes by Congress must be regarded as penalties and therefore not within the meaning of these sections.

III

SECTIONS 3257 AND 3281 OF THE REVISED STATUTES WERE NOT REPEALED BY SECTIONS 25 AND 22, TITLE II OF THE NATIONAL PROHIBITION ACT

The petitioners next assert that Section 3257 was impliedly repealed by the National Prohibition Act and was not reenacted by the Willis-Campbell Act because it is "directly in conflict" with Section 25, Title II, of the National Prohibition Act. Section 25 declares it to be unlawful to possess any liquor, or property designed for the manufacture of liquor, intended for use in violating Title II of the Act, and provides that if it is found that such liquor or property is unlawfully possessed it shall be destroyed unless the court shall otherwise order. Section 3257 provides punishment by fine and/or imprisonment and for the forfeiture of property of the distiller who defrauds or attempts to defraud the United States of the tax on the spirits distilled by him. Section 3281 provides punishment by fine, and/or imprisonment and for the forfeiture of property of the distiller who conducts his business with intent to defraud the United States of the tax on the spirits distilled by him. Sections 3257 and 3281 are not in direct conflict with Section 25 of Title II of the National Prohibition Act, nor are they in conflict with Section 22, Title II, of the National Prohibition Act, which provides for the abatement of liquor nuisances and the closing of premises upon which they are maintained. *United States* v. *One Ford Coupé,* 272 U. S. 321. Each

offense is distinct. *Albrecht* v. *United States,* 273 U. S. 1. Moreover, Section 3281 was among the statutes which this Court specifically held in *United States* v. *Stafoff*, 260 U. S. 477, had been reenacted by the Willis-Campbell Act, and Section 3257, which had been specifically held repealed in *United States* v. *Yuginovich*, 256 U. S. 450, was clearly included among the statutes referred to in the following language of the *Stafoff case* (p. 480):

> But the Supplemental Act that we have quoted puts a new face upon later dealings. From the time that it went into effect it had the same operation as if instead of saying that the laws referred to shall continue in force it had enacted them in terms.

IV

THE PRESENT PROCEEDINGS ARE NOT BARRED UNDER SECTION 5 OF THE WILLIS-CAMPBELL ACT BECAUSE OF THE CONVICTION OF THE WATERLOO DISTILLING CORPORATION AND OTHERS FOR CONSPIRACY TO VIOLATE THE NATIONAL PROHIBITION ACT

The petitioners' final contention is that by virtue of the provision of Section 5 of the Willis-Campbell Act, that where an act is a violation of the prior laws relating to liquor and also of the National Prohibition Act, a conviction for such act under the one shall bar a prosecution therefor under the other, the present suit was barred by the prior conviction of the Waterloo Distilling Corporation of conspiracy to violate the National Prohibition Act. (See *United States* v. *Austin-Bagley Corporation,* 31 F. (2d) 229.)

The prior conviction relied upon was for conspiracy in violation of Section 37 of the Criminal Code. True, the conspiracy was to sell alcohol for beverage purposes in violation of the National Prohibition Act, but there was no conviction for any act in violation of the National Prohibition Act, or for any offense thereunder. Nor can it be said that a proceeding to forfeit property is a "prosecution." *United States* v. *One Ice Box*, 37 F. (2d) 120 (N. D. Ill.); *United States* v. *385 Barrels, etc., of Wine*, 300 Fed. 565 (S. D. N. Y.). Consequently, Section 5 of the Willis-Campbell Act, quoted *supra*, can have no application, and this case is governed by principles of criminal law and procedure of general application, which are not dependent upon the Willis-Campbell Act. Conviction of the crime of conspiracy does not bar prosecution for the substantive offense. Nor does the conviction of the owner of a distillery for violation of the internal revenue laws bar proceedings to forfeit his property seized because of such violation. *United States* v. *Three Copper Stills*, 47 Fed. 495 (D. C., D. Ky.); *United States* v. *One Machine for Corking Bottles*, 267 Fed. 501 (W. D. Wash.). See *Wood* v. *United States*, 204 Fed. 55 (C. C. A. 4th); *United States* v. *Olsen*, 57 Fed. 579 (N. D. Cal.).

The case of *United States* v. *La Franca* (No. 74, October Term, 1930, now pending in this Court on a writ of certiorari), asserted by petitioners to be "identical" with the present case, was a suit to

recover taxes and penalties and did not involve any forfeiture proceedings.

CONCLUSION

The case was correctly decided below and no adequate reason is advanced to justify review by this Court. The petition should be denied.

Respectfully submitted.

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JULY, 1930.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 114

VARIOUS ITEMS OF PERSONAL PROPERTY, ETC.; THE WATERLOO DISTILLING CORPORATION ET AL.

v.

UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF BONDHOLDERS' COMMITTEE AS AMICUS CURIAE URGING ISSUANCE OF THE WRIT.

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WM. J. HUGHES, JR.,
Counsel for Bondholders' Committee.

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STATEMENT.

Although holders of bonds of the Waterloo Distilling Corporation, petitioner herein, were not made

parties to the proceeding, nevertheless their interests will be vitally affected by the decision herein. If the petition is denied the result will be to wipe out completely the interests of these stockholders. The bondholders feel that both upon the law and the facts, the petition should be granted, and to that end submit herewith this memorandum.

POINT I.

The Decision of This Court in Campbell v. Long & Company, Nos. 445, 510 and 511, October Term, 1929, Dated Maly 26, 1930, Subsequent to the Decision of the Court Below Herein, Holding That "Denatured Alcohol, However Treated, Is Not Fit for Beverage Purposes," Vitally Affects the Case Herein.

The forfeiture herein is the result of a claim on the part of the Government that the Waterloo Distilling Corporation carried on the business of a distiller with intent to defraud the United States of the tax on distilled spirits provided for by Section 600-a-4, as amended, of the Revenue Act of 1918. This section provides for a tax of $6.40 per gallon "on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage."

It would seem from a mere reading of this section that a prerequisite to its application and to the forfeiture provisions of Sections 3257 R. S. and 3281 R. S., would be the fact that the article in this case, i.e., specially denatured alcohol, was or could be fit for beverage purposes. However, this Court, in *Camp-*

bell v. Long & Company, Inc., No. 445, October Term, 1929 (May 26, 1930), specifically held that "denatured alcohol, however treated, is not fit for beverage purposes."

This Court further held that denatured alcohol, during its manufacture and preparation for the market, was not "liquor."

As opposed to the decision of this Court in the *Long Case, supra,* above quoted, the Court below held that although the alcohol alleged to have been diverted was not pure alcohol, and stated that it was specially denatured at the time of diversion, it held that it could later on be "cleaned," i.e., the poisons extracted, and could be used for beverage purposes. The Court below held that the tax imposed by Section 600-a-4 was justified on that ground.

Obviously, this reasoning is directly contrary to the holding of this Court in the *Long Case,* that denatured alcohol is not, and cannot be made fit, for beverage purposes. There is no claim in the present case that anything other than denatured alcohol constituted the distilled spirits, tax on which is alleged to have been avoided, in violation of Section 600-a-4.

Article 88 of Regulations No. 61 of the Treasury Department defines denatured alcohol as follows:

> "Denatured alcohol is ethyl alcohol to which has been added such denaturing materials as to render the alcohol unfit for use as an intoxicating beverage."

It follows from the above that the alleged distilled spirits (the article) alleged to have been diverted in fraud of the Government tax, being specially denatured alcohol, were not and never could be the subject of

tax as provided in Section 600-a-4 as amended. As no tax could be legally levied on denatured alcohol, it follows that the forfeiture proceeding based upon the claim that such a tax was due, was likewise illegal.

POINT II.

The Present Case Is on All Fours with the La Franca Case in Which This Court Granted Certiorari at the Last Term.

This Court granted a writ of certiorari in the case of *La Franca v. United States* on May 5, 1930. The question there involved was whether a criminal prosecution under the National Prohibition Act prevented the Government from assessing a penalty for violation of the Prohibition Act under Section 3244 R. S., as amended. The Circuit Court of Appeals for the Fifth Circuit held that a penalty imposed for criminal misconduct was punitive even though enforceable by civil proceeding and that conviction or acquittal in a criminal case involving the same subject matter barred further prosecution civilly or criminally.

It is noted that the Government, on page 15 of its brief in opposition, attempts to distinguish the *La Franca Case* from the present case with the statement that the *La Franca Case* was a suit to recover taxes and penalties and did not involve any forfeiture proceedings.

There would seem to be no difference in principle between a penalty and a forfeiture, both being prosecutions and punitive in character. The cases are identical in that the *La Franca Case* involves a penalty, and the present case a forfeiture, both prescribed by

statutes passed prior to the passage of the National Prohibition Act. Both are within the meaning of Section 5 of the Willis-Campbell Act (27 U. S. C. A., Sec. 3), providing:

> "* * * if any act is a violation of any such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to a prosecution therefor under the other."

The reasoning of the Court in the *La Franca Case* that a penalty imposed for criminal misconduct is none the less punitive by reason of the fact that it may be enforced by a proceeding civil in form, is equally applicable to a forfeiture. Both in the *La Franca Case* and in the present case the object of the forfeiture proceedings, which followed closely upon the conviction in the criminal case, was to subject the parties to additional punishment for acts for which they were convicted.

This Court has defined a forfeiture as "a punishment, in effect, for a violation of some duty enjoined upon the party by law." (*Maryland v. Baltimore R. Co.*, 3 How. 534, 11 L. Ed. 714). In *Van Buren v. Digges*, 11 How. 462, 476, 13 L. Ed. 771, this Court said:

> "The term 'forfeiture' imports a penalty. * * * It implies an absolute infliction regardless of the nature and extent of the causes by which it is superinduced."

The forfeitures in the present case were achieved by Sections 3257 R. S. and 3281 R. S. Both state in so many words that for the infraction defined, the articles

in question shall be "forfeited" to the United States.

In the present case petitioner, Waterloo Distilling Corporation, was convicted of conspiracy to violate the Prohibition Act. This was equivalent, for the purposes of the statutes here involved, to conviction of a violation of the Prohibition Act itself. The Court so held in *United States v. Goldman*, 28 Fed. (2d) 424.

CONCLUSION.

It should be of the utmost importance to the Government (there being so many cases of this nature) to know definitely whether or not a criminal conviction or acquittal is a bar to a subsequent proceeding by way of forfeiture. The Petition shoud be granted.

Respectfully submitted,

WM. E. LEAHY,
WM. J. HUGHES, JR.,
Counsel for Bondholders Committee,
Waterloo Distilling Corporation.

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No. 114

In the Supreme Court of the United States

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VARIOUS ITEMS OF PERSONAL PROPERTY, ETC., THE WATERLOO DISTILLING CORPORATION ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The charge of the District Court to the jury is set forth at pages 157 to 172 of the record. The opinion of the Circuit Court of Appeals (R. 191) is reported in 40 F. (2d) 422.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 21, 1930. (R. 197.) The petition for certiorari was filed May 14, 1930, and was granted October 13, 1930. (R. 198.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether alcohol which has been diverted to beverage purposes after having been specially denatured to facilitate such diversion is subject to the tax imposed by Section 600 (a) (4) of the Revenue Act of 1918, as amended, upon distilled spirits diverted to beverage purposes.

2. Whether such "tax" is a penalty and therefore not within the contemplation of Sections 3257 and 3281 of the Revised Statutes, which provide for the forfeiture of the distillery of any distiller who defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or who engages in such business with intent to defraud the United States of such tax.

3. Whether Sections 3257 and 3281 of the Revised Statutes are directly in conflict with Sections 25 and 22, Title II, of the National Prohibition Act, and, therefore, impliedly repealed by that Act.

4. Whether the prior conviction of the distiller of conspiracy to violate the National Prohibition Act bars the present suit to forfeit the distillery.

5. Whether certain premises were properly included in the judgment of forfeiture.

STATUTES INVOLVED

These are set forth in the appendix to this brief, pp. 22–27, *infra*.

STATEMENT

This was a libel by the United States to forfeit a distillery, a warehouse, and a denaturing plant

at Waterloo, New York. The libel charged in its first and second counts that between October 1, 1926, and March 1, 1927, the Waterloo Distilling Corporation had carried on the business of a distiller upon the libeled premises with intent to defraud the United States of the tax on the spirits distilled; that during the same period, it had attempted to defraud and had defrauded the United States of such tax, and that in consequence of these acts the property libeled had become forfeited to the United States under Sections 3281 and 3257 of the Revised Statutes. The fraud alleged consisted of the withrawal of alcohol, ostensibly for nonbeverage but actually for beverage purposes, without payment of the tax imposed by Section 600 (a) of the Revenue Act of 1918, as amended, upon distilled spirits diverted to beverage purposes. (R. 2–5.) A third count, drawn under Section 3453 of the Revised Statutes, was dismissed on stipulation. (R. 5–6, 17.) An answer to the libel was filed by the Waterloo Distilling Corporation, one of the petitioners, denying the allegations of the libel in so far as it charged any violation of law. (R. 7–10.) Answers were also filed by the Seneca Solvents & Chemical Corporation, Max Rein and Fannie Rein, petitioners here, claiming title to parts of the libeled property. R. 10–14.)

Before the taking of any testimony the respondents [petitioners here] moved to dismiss the libel on the ground that the Government had previously elected to proceed against the Waterloo Distilling

Corporation and others upon the charge of conspiracy to violate the National Prohibition Act (see *United States* v. *Austin-Bagley Corporation*, 31 F. (2d) 229) and was accordingly barred from proceeding to forfeit the property of that corporation "under the Internal Revenue Laws." The motion was denied. (R. 22–23.)

At the trial the Government introduced evidence tending to establish that from October, 1926, to March, 1927, the Waterloo Distilling Corporation was operating an industrial alcohol plant, a bonded warehouse, and a denaturing plant at Waterloo, New York, under Government permits (R. 25–26); that during this period it had withdrawn large quantities of alcohol from its bonded warehouse, ostensibly for complete denaturation at its denaturing plant, but that it had in fact only specially denatured such alcohol and had thereupon shipped it under false billings to fictitious consignees so that it might be "cleaned" and made fit for beverage purposes. (R. 47–54, 94–96.)

The jury returned a verdict in favor of the libelant (R. 172) and judgment was entered declaring the libeled property forfeited to the United States. (R. 19–20.) Upon appeal the judgment was affirmed (R. 197) and thereafter this Court granted a writ of certiorari (R. 198).

The petitioner contends: (1) That the article diverted to beverage purposes was not "distilled spirits," but denatured alcohol, which is not subject

to tax under Section 600 (a) of the Revenue Act of 1918, as amended; (2) that the "tax" imposed by Section 600 (a) is a *penalty* and therefore the provisions of Sections 3257 and 3281 of the Revised Statutes, forfeiting property of a distiller who defrauds or attempts to defraud the United States of a *tax*, or who engages in such business with intent to defraud the United States of a *tax*, have no application to the instant suit; (3) that Sections 3257 and 3281 are, respectively, in direct conflict with Sections 25 and 22, Title II, of the National Prohibition Act, and were therefore impliedly repealed by that Act; (4) that as the Waterloo Distilling Corporation and others had previously been indicted and convicted on the charge of conspiring to violate the National Prohibition Act because of certain of the transactions involved in the instant case, the Government was barred from proceeding to forfeit the distillery of that company under Sections 3257 and 3281 of the Revised Statutes, and (5) that certain land outside the bonded premises was erroneously included in the judgment of forfeiture.

SUMMARY OF ARGUMENT

The article diverted was the *pure alcohol*, which was withdrawn from bond for the purpose of being denatured and disposed of to purchasers to be "cleaned" and ultimately used for beverage purposes. The diversion was therefore of distilled spirits subject to tax under Section 600 (a) of the Revenue Act of 1918, as amended.

In *United States* v. *One Ford Coupe*, 272 U. S. 321, it was held that the basic tax of $2.20 a gallon imposed upon the production of distilled spirits by Section 600 (a) is a true tax whether the spirits are legally or illegally produced. As that same basic production tax is included in the "tax" of which the distillery in the present proceedings is alleged to have defrauded, or attempted to defraud, the United States, it is clear that a portion, at least, of the impositions here involved is a true tax and hence within Sections 3257 and 3281.

Sections 3257 and 3281 of the Revised Statutes are not in direct conflict, respectively, with Sections 25 and 22, Title II, of the National Prohibition Act and hence were not impliedly repealed by that Act. The statutes said to conflict were enacted for different purposes and cover different ground. Sections 3257 and 3281 were designed to enforce payment of taxes on the manufacture of liquor, whereas Sections 22 and 25 were intended to prevent the manufacture and use of liquor for beverage purposes. Moreover, Section 3281 was specifically held in *United States* v. *Stafoff*, 260 U. S. 477, to have been reenacted by the Willis-Campbell Act, and Section 3257, which had been held repealed in *United States* v. *Yuginovich*, 256 U. S. 450, was clearly included among the statutes described in the *Stafoff case* as reenacted by the Willis-Campbell Act.

The prior conviction of the Waterloo Distilling Corporation of conspiracy to sell alcohol in violation of the National Prohibition Act does not bring the present suit within Section 5 of the Willis-Campbell Act, which provides that where an act is a violation of the prior laws relating to liquor and also of the National Prohibition Act a "conviction" for such act or offense under the one shall bar a "prosecution" therefor under the other. The prior conviction was for conspiracy in violation of Section 37 of the Criminal Code. There has been no conviction for any act or offense under the National Prohibition Act. If this were not so, still there is no identity even in the substantive offenses. Illegally selling liquor is not at all the same offense as carrying on the business of a distiller with intent to defraud the United States of a tax. Furthermore, the bar of Section 5 is against a "prosecution" after there has been a "conviction." The present suit is not a "prosecution."

The petitioners' final contention, that an island adjacent to the distillery was erroneously included in the judgment of forfeiture because not a part of the bonded premises or used as a means of ingress thereto or egress therefrom, is not sustained by the record. Moreover, we do not believe this question is properly before this Court since it was not urged before or passed upon by the court below and was not included in the Specification of Errors in the petition for a writ of certiorari.

34251—31——2

ARGUMENT

I

THE ARTICLE DIVERTED TO BEVERAGE PURPOSES WAS DISTILLED SPIRITS SUBJECT TO TAX UNDER SECTION 600 (A) OF THE REVENUE ACT OF 1918, AS AMENDED

Because the pure alcohol which was withdrawn by the distiller from its bonded warehouse was first specially denatured, and hence made unfit to drink, before being disposed of to purchasers (with the object, as must be presumed to have been found by the jury, that it should be "cleaned" and ultimately used for beverage purposes), the petitioners contend that the diversion was not of "distilled spirits" but of denatured alcohol and that accordingly the tax imposed by Section 600 (a) of the Revenue Act of 1918, as amended (pp. 23–24, *infra*), could not apply. We answer that the diversion to beverage purposes began when the alcohol was withdrawn with the intent that it should ultimately be used for beverage purposes, and that the denaturation was but a step in such diversion.

The trial court charged the jury:

> * * * in order to find for the Government * * * you must find that the distillery did put out alcohol, intending that that alcohol shall be used for an illegitimate purposes, and for beverage purposes; and if you find that the distillery did divert its

> alcohol from its legitimate business, and did convey it into channels in which it would be used for beverage purposes, then you have found that the distillery has sent out from its plant distilled spirits which were subjected to a tax by the Government, which was not paid; * * * (R. 165.)
>
> * * * * *
>
> * * * if you say you find for the Government, you find that this particular distillery carried on its business with intent to defraud the Government, and by defrauding the Government, it means that they put out from their distillery a product *which could be used, intended to be used for the making of a beverage* * * *. (R. 167.) (Italics ours.)

The Government does not contend, as the petitioners assert, that specially denatured alcohol is "liquor" or that it is "potable." It does contend that specially denatured alcohol may be made potable and fit for beverage purposes, and that, under the instructions given, the jury must be regarded as having so found with respect to the article involved in the instant case. As the jury found, the "diversion" was of alcohol, admittedly "distilled spirits," and the diversion began when the alcohol was withdrawn from the bonded warehouse with the intent that it should be ultimately used for beverage purposes.

II

THE TAX IMPOSED IN THIS CASE UNDER SECTION 600 (a) OF THE REVENUE ACT OF 1918, AS AMENDED, IS WITHIN THE CONTEMPLATION OF SECTIONS 3257 AND 3281 OF THE REVISED STATUTES

The petitioners cite *Lipke* v. *Lederer*, 259 U. S. 557, and *Regal Drug Co.* v. *Wardell*, 260 U. S. 386, as establishing that the "tax" imposed by Section 600 (a) of the Revenue Act of 1918, as amended, is a "penalty," and from this they argue that the defrauding or attempting to defraud of such "tax" by a distiller, or the engaging in the business of a distiller with the attempt to defraud thereof, are acts not within Sections 3257 and 3281 of the Revised Statutes. (*Infra*, pp. 22–23.)

The cases cited declare that where a "tax" is imposed upon dealings which are made criminal by law and the essential purpose of the "tax" is that of "punishment for infraction of the law," such an imposition, though called a tax, is in reality a penalty and can not be lawfully collected by distraint upon an assessment made without notice and hearing given the person called upon to pay it.

Thus the *Lipke case* held that the so-called "double tax" imposed by Section 35, Title II, of the National Prohibition Act upon the illegal manufacture or sale of liquor is a penalty rather than a tax.

The same conclusion was reached in the *Regal Drug Co. case* with respect to the tax of $6.40 imposed by Section 600 (a) of the Revenue Act of

1918, *but only in so far as the tax of $6.40 exceeded the basic tax of $2.20 imposed by that section.* Section 600 (a) imposed a tax of $2.20 per gallon "on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States." (c. 18, 40 Stat. 1057, 1105.) In the *Regal Drug Co. case* this tax of $2.20 had been paid by the distiller (260 U. S. 386, 388, 389; see also the record in that case, No. 108, October Term, 1922, pp. 4–5, 7), and the taxing authorities were endeavoring to collect only the sum of $4.20 per gallon, the difference between the tax paid upon the lawful withdrawal of the distilled spirits and the total tax of $6.40 imposed by Section 600 (a) when the distilled spirits were diverted to beverage purposes.

In the instant case no taxes under Section 600 (a) have been paid and the amount charged by the taxing authorities against the petitioners is the entire tax of $6.40. This sum by the express terms of Section 600 (a) (4), p. 24, *infra*, includes the underlying or basic tax of $2.20 which is exacted *for dealings which may be permissible and lawful.* Neither the *Lipke case* nor the *Regal Drug Co. case* decides that *this* part of the sum of $6.40 is not a real tax. While there may be some doubt as to the limits of the rule of the *Lipke* and *Regal Drug Co. cases,* in view of the subsequent statement of this Court that "a tax on intoxicating liquor does not cease to be such because the sovereign has declared that none shall be manufactured, and because the

main purpose in retaining the tax is to make law-breaking less profitable" (*United States* v. *One Ford Coupe*, 272 U. S. 321, 328, and see *Murphy* v. *United States*, 272 U. S. 630, 631–632), this Court has expressly held that to the extent that the total tax set forth in Section 600 (a) (4) represents an imposition which may be incurred without violating the law, it is a real tax and not a penalty. *United States* v. *One Ford Coupe*, *supra*, p. 328.

In the *One Ford Coupe case* the Government brought proceedings to forfeit an automobile under Section 3450 of the Revised Statutes, which provides for the forfeiture of vehicles used for the removal, deposit, or concealment of commodities with intent to defraud the United States of the "tax" thereon. It was contended that that statute had no application where the commodity involved was illicit liquor because upon the passage of the National Prohibition Act what had theretofore been a tax on such liquor ceased to be such and became a penalty. Overruling the contention, this Court said (p. 328):

> What was sought to be enforced and held to be a penalty in *Lipke* v. *Lederer*, 259 U. S. 557, 561, was the so-called double tax. *Here, we are dealing with the basic production tax.*
>
> With respect to the character of the impositions called taxes there is nothing in either the Revenue Acts or the Prohibition Act which makes any distinction between the

> product of legal and illegal distillation. *The Acts left in effect the basic tax of $2.20 per gallon, which was and is a true tax on the product, whether legally or illegally distilled,* and added to it the additional amounts in case of illegal distillation or diversion to illegal uses. These additional amounts also are called taxes by Congress, and were understood by it to be such. Whether they were intrinsically penalties and should be treated as such we need not determine. *The basic tax of $2.20 a gallon on liquor illegally produced is not imposed because of illegality, but despite of it. It is a tax within the meaning of Section 3450* * * *. (Italics ours.)

Obviously, if the basic tax of $2.20 a gallon imposed by Section 600 (a) is a tax within the meaning of Section 3450, it is likewise a tax within the meaning of Sections 3257 and 3281. As such basic tax is included in the "tax" upon which the present forfeiture proceedings are based, it follows that a portion, at least, of the impositions here involved is a true tax and hence within the provisions of Sections 3257 and 3281.

III

SECTIONS 3257 AND 3281 OF THE REVISED STATUTES WERE NOT REPEALED BY SECTIONS 25 AND 22, TITLE II, OF THE NATIONAL PROHIBITION ACT

The petitioners assert that Sections 3257 and 3281 were impliedly repealed by the National Pro-

hibition Act and were not reenacted by the Willis-Campbell Act because they were in direct conflict, respectively, with Sections 25 and 22, Title II, of the National Prohibition Act. Section 25, pp. 26–27, *infra*, declares it to be unlawful to possess any liquor, or property designed for the manufacture of liquor, intended for use in violating Title II of the Act, and provides that if it is found that such liquor or property is unlawfully possessed it shall be destroyed unless the court shall otherwise order. Section 3257, on the other hand, p. 22, *infra*, provides for the punishment of any distiller who defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, by fine and imprisonment and by forfeiture of the distillery and materials found therein. Section 22, pp. 25–26, *infra*, provides for the abatement of liquor nuisances and the closing of premises upon which they are maintained, whereas Section 3281, pp. 22–23, *infra*, provides punishment by fine and imprisonment and for the forfeiture of property of the distiller who conducts his business without giving bond as required by law or with intent to defraud the United States of the tax on the spirits distilled by him.

The statutes alleged to be in direct conflict were enacted for different purposes and occupy different fields. Sections 3257 and 3281 of the Revised Statutes were designed to enforce the payment of taxes on the manufacture of liquor. Sections 22

and 25 of Title II of the National Prohibition Act were intended to prevent the manufacture and use of beverage liquor. Sections 3257 and 3281 R. S. require as an essential element of the offenses there dealt with an attempt or intent to defraud the United States of a tax. No such attempt or intent is involved in the offenses dealt with by Sections 22 and 25. That parts of the same transaction are punishable under both laws does not establish direct conflict between them. *United States* v. *One Ford Coupe*, 272 U. S. 321, 330–331. The offense under each is unquestionably distinct. See *Morgan* v. *Devine*, 237 U. S. 632; *Gavieres* v. *United States*, 220 U. S. 338.

Moreover, Section 3281 was among the statutes which this Court specifically held in *United States* v. *Stafoff*, 260 U. S. 477, had been reenacted by the Willis-Campbell Act; and Section 3257, which had been specifically held repealed in *United States* v. *Yuginovich*, 256 U. S. 450, was, we submit, clearly included among the statutes referred to in the following language of the *Stafoff case* (p. 480):

> But the Supplemental Act that we have quoted puts a new face upon later dealings. From the time that it went into effect it had the same operation as if instead of saying that the laws referred to shall continue in force it had enacted them in terms.

IV

THE PRESENT PROCEEDINGS ARE NOT BARRED BECAUSE OF THE CONVICTION OF THE WATERLOO DISTILLING CORPORATION AND OTHERS FOR CONSPIRACY TO VIOLATE THE NATIONAL PROHIBITION ACT

The petitioners next contend that the present proceedings are barred because of the prior conviction of the Waterloo Distilling Corporation and others for conspiracy to violate the National Prohibition Act. (See *United States* v. *Austin-Bagley Corporation*, 31 F. (2d) 229.) It is first suggested that the provisions relating to penalties and forfeitures in the National Prohibition Act are in direct conflict with such provisions in the prior internal revenue laws and that since the Government elected to proceed originally under the National Prohibition Act by way of the indictment for conspiracy, any suits for penalties or forfeiture of the property involved in the conspiracy must be brought *under that Act*. For this conclusion *Commercial Credit Company* v. *United States*, 276 U. S. 226, is cited. It is further contended that the prior conviction of the Distilling Corporation bars the present proceeding because of the provision of Section 5 of the Willis-Campbell Act, pp. 24–25, *infra*, that where an act is a violation of any laws relating to liquor "that were in force when the National Prohibition Act was enacted" and also of the National Prohibition Act, a conviction for such act under one shall bar a "prosecution" therefor under

the other. These contentions are likewise untenable.

In point III, *supra*, we have answered the contention that Sections 3257 and 3281 of the Revised Statutes are in direct conflict, respectively, with Sections 25 and 22, Title II, of the National Prohibition Act, and are unable to find in the *Commercial Credit Company case* any authority for the proposition that once punitive proceedings have been instituted by the Government for an offense under the National Prohibition Act, thereafter any punitive proceedings for *other offenses*, if any, arising out of the same general transactions must be instituted *under that Act*.

The prior conviction relied upon was for conspiracy in violation of *Section 37 of the Criminal Code*. (R. 21–23.) True, the conspiracy was to sell alcohol for beverage purposes in violation of the National Prohibition Act, but the conviction was not "under" the National Prohibition Act but "under" the Criminal Code. The distinction between a conspiracy to commit an offense and the actual commission of the offense itself was pointed out by this Court in *United States* v. *Rabinowich*, 238 U. S. 78, where the question involved was whether an indictment charging a conspiracy to commit an offense under the Bankruptcy Act came within the provision of Section 29 (d) thereof lim-

iting to one year a prosecution "for any offense arising under this Act." Answering that question in the negative, this Court said (pp. 85–86):

> It is apparent from a reading of § 37, Crim. Code (§ 5440, Rev. Stat.), and has been repeatedly declared in decisions of this court, that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. * * * The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable. * * * And it is punishable as conspiracy, though the intended crime be accomplished. * * *

It is plain, therefore, that the prior conviction of the Waterloo Distilling Corporation was not under the National Prohibition Act and that the bar of Section 5 of the Willis-Campbell Act has no application to the present suit.

If this were not so, still there is no identity even in the substantive offenses within the meaning of Section 5. The offense of selling liquor (see *United States* v. *Austin-Bagley Corporation*, 31 F. (2d) 229, 230, *supra*), is not the same offense as carrying on the business of a distiller with intent to defraud of a tax. The acts and offenses involved are dissimilar. In other words, the present proceeding is not based upon the same act for which the prior conviction was had.

Furthermore, the bar of Section 5 is against a "prosecution" after there has been a "conviction." Taken in their natural sense, the words quoted apply to criminal proceedings and indicate that the purpose of Congress in enacting the provision in question was to prevent a person from being subjected for the same act to two criminal prosecutions, although brought under different laws. It would be an extension of the ordinary meaning of its language to hold that the statute applies to civil proceedings *in rem* to forfeit property, which itself, as distinguished from its owner, is regarded as the real offender. *Goldsmith-Grant Co.* v. *United States*, 254 U. S. 505; *United States* v. *One Ice Box*, 37 F. (2d) 120, 124 (N. D. Ill.); *United States* v. *385 Barrels, etc., of Wine*, 300 Fed. 565 (S. D. N. Y.).

V

THE DECREE DID NOT INCLUDE PREMISES WHICH WERE NOT PROPERLY SUBJECT TO FORFEITURE

The petitioners finally contend that the decree of forfeiture improperly included certain property owned by the Waterloo Distilling Corporation which was not "bonded" and hence was not part of the "distillery premises." This property is described only as "an island * * * adjacent to the distillery premises." It is asserted that this island was not described in the application of the distilling corporation for its permit to operate a distillery and that it is not described in the permit.

No record references are given in support of these assertions. (See Pet. Br. 34–35.)

The record contains references to a "Watkins Island" upon which the petitioner's bonded warehouse and denaturing plant were located. (R. 13, 14, 28–29.) The record also shows that the "bonded premises" included "the distillery building, the bonded warehouse building and the denaturing plant." (R. 30.) Section 3281 of the Revised Statutes provides that the forfeiture shall extend to "the lot or tract of land on which such distillery is situated" and the premises "used for purposes of ingress or egress to or from such distillery." (*Infra*, pp. 22–23.) Clearly the foregoing evidence that the distillery warehouse and denaturing plant were located upon the island is not overcome by the fact that the distilling corporation failed to include a description of the island in its application for a permit.

Moreover, we do not believe that the contention of the petitioners is properly before this Court. No instructions to the jury on the question of whether any property was improperly included in the libel were asked or given. (R. 157–172.) Although the petitioners included in their numerous assignments of error the denial by the trial court of motions to dismiss the libel (R. 185, 187) "as to all real property outside the bonded premises, except the part outside such bonded premises, if any, as was used by the Waterloo Distilling Corporation for purposes of ingress and egress"

(R. 110, 173), no reference whatever was made thereto in the briefs filed by the petitioners in the Circuit Court of Appeals, and the point was not passed upon by that court.

In the petition for certiorari filed in this Court, the point was included in the enumeration of questions said to be involved, but it was not included in the "Specification of Errors" and no mention was made of it in the brief accompanying the petition.

This Court has held that it will not consider questions, not jurisdictional or otherwise fundamental, which were not presented for the consideration of the lower court. *Gila Valley Ry. Co.* v. *Hall*, 232 U. S. 94, 98–99. See *McCarthy* v. *Arndstein*, 262 U. S. 355, 360. Nor will this Court consider questions not raised by the petition for a writ of certiorari. *Webster Electric Co.* v. *Splitdorf Co.* 264 U. S. 463.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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JANUARY, 1931.

APPENDIX

STATUTES INVOLVED

Section 3257 of the Revised Statutes (U. S. C., Title 26, Sec. 261) provides:

> Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits, and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years.

Section 3281 of the Revised Statutes (U. S. C., Title 26, Sec. 306) provides:

> Every person who carries on the business of a distiller without having given bond as required by law, or who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, shall, for every such offense, be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years. And all distilled spirits or wines, and all stills or other apparatus fit or intended to be used for the distillation or rectification of spirits, or for the compounding

> of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person, who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or inclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.

Section 600 (a) of the Revenue Act of 1918, as amended (*c.* 27, Sec. 900, 44 Stat. 9, 104; U. S. C., Title 26, Sec. 245), provides, so far as material here:

> SEC. 600 (a) There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law:

(1) Until January 1, 1927, $2.20 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon;

* * * * *

(4) On and after the enactment of the Revenue Act of 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person responsible for such diversion. If a tax at the rate of $2.20, $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph.

Section 5 of the Willis-Campbell Act, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3), provides:

That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties pro-

vided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

Section 22, Title II, National Prohibition Act, c. 85, 41 Stat. 305, 314 (U. S. C., Title 27, Sec. 34), provides:

> An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this Act constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no liquors shall

be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than $500 nor more than $1,000, payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this title upon said property.

Section 25 of the same Title (U. S. C., Title 27, Sec. 39) provides (p. 315):

It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court

shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process.

U. S. GOVERNMENT PRINTING OFFICE: 1931

SUPREME COURT OF THE UNITED STATES.

No. 114.—October Term, 1930.

Various Items of Personal Property, etc.; The Waterloo Distilling Corporation, et al., Petitioners,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 24, 1931.]

Mr. Justice Sutherland delivered the opinion of the Court.

This was a proceeding, under R. S. §§ 3257 and 3281, by the United States to forfeit a distillery, warehouse and denaturing plant of the Waterloo Distilling Corporation on the ground that the corporation had conducted its distilling business upon the premises with intent to defraud, and had defrauded, the government of the tax on the spirits distilled, in consequence of which the premises had become forfeited to the government. The fraud alleged was the withdrawal of alcohol ostensibly for nonbeverage but in reality for beverage purposes, without payment of the tax on spirits diverted to beverage purposes imposed by § 600 (a) of the Revenue Act of 1918, as amended. The corporation denied any violation of law. Evidence was introduced by the government tending to support the libel. The government admitted that, prior to the filing of the libel, the corporation and others had been indicted and convicted for conspiring to violate provisions of the statute, involving the transactions set forth in the libel as a basis for the forfeiture. A motion to dismiss the libel on the ground that the forfeiture proceedings were therefore barred was denied by the district court. There was a verdict for the government and judgment declaring a forfeiture of the premises to the government. This judgment was affirmed by the court below. 40 F. (2d) 422.

The only questions arising upon the record which we deem it necessary to consider are two in number: (1) whether under § 600 (a) of the Revenue Act of 1918, as amended, there was a

diversion of distilled spirits to beverage purposes; (2) whether a conviction of a conspiracy to violate § 600 (a) barred the proceedings to forfeit the premises.

First. By § 600 (a), as amended (U. S. C., Supp. III, Title 26, § 245 (4)), it is provided:

"On and after February 26, 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person responsible for such diversion. If a tax at the rate of $2.20, $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph."

Included in the $6.40 is the basic tax of $2.20, which is not a penalty but a true tax. Only the remaining part of the $6.40 may be regarded as a penalty; but, whether the exaction be a tax or a penalty or partly one and partly the other, there is no constitutional objection to enforcing it by forfeiture of the offending property. See *United States* v. *One Ford Coupe,* 272 U. S. 321, 328-329.

The alleged diversion was accomplished by the withdrawal of pure alcohol, which was then specially denatured and made unfit to drink, and in that condition was sold. Petitioners contend that this was a diversion not of distilled spirits, but of denatured alcohol, and, therefore, not within the reach of § 600 (a). But upon the evidence and the instructions of the court it was open to the jury to find that the alcohol was specially denatured to the contemplated end that, after it had passed into the hands of purchasers, it would be "cleaned" and finally used for beverage purposes. In that view it is entirely accurate to say that the alcohol was diverted to beverage purposes, the special denaturing being only an intervening step.

Second. In *United States* v. *La Franca,* 282 U. S. —, decided this day, we hold that, under § 5 of the Willis-Campbell Act, a civil action to recover taxes, which in fact are penalties, is punitive in character and barred by a prior conviction of the defendant for a criminal offense involving the same transactions. This, however, is not that case, but a proceeding *in rem* to forfeit property used

in committing an offense. At common law, in many cases, the right of forfeiture did not attach until the offending person had been convicted and the record of conviction produced. But that doctrine did not apply, as this court in an early case pointed out, where the right of forfeiture was "created by statute, *in rem*, cognizable on the revenue side of the Exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offense be *malum prohibitum*, or *malum in se.*" *The Palmyra*, 12 Wheat. 1, 14. In that case the forfeiture was of a vessel in admiralty. But in *Dobbins's Distillery* v. *United States*, 96 U. S. 395, the property seized was a distillery in the hands of a lessee. The acts or omissions of the lessee with intent to defraud the revenue were unknown to the owner. Nevertheless, it was held that the distillery was subject to forfeiture. The court after referring to *The Palmyra, supra*, and to the statute which provided for the forfeiture of the property in consequence of the unlawful acts of the distiller with intent to defraud, said (p. 401):

"Nothing can be plainer in legal decision than the proposition that the offence therein defined is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery."

To the same effect, see *Goldsmith-Grant Co.* v. *United States*, 254 U. S. 505, 510-512; *United States* v. *Five Boxes of Asafoetida*, 181 Fed. 561, 564. And compare *Murphy* v. *United States*, 272 U. S. 630, 632.

A forfeiture proceeding under R. S. 3257 or 3281 is *in rem*. It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is no part of the punishment for the criminal offense. *Origet* v. *United States*, 125 U. S. 240, 245-247. The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply. *United States* v. *Three Copper Stills*, 47 Fed. 495, 499; *United States* v. *Olsen*, 57 U. S. 579, 582 *et seq.*; *Sanders* v. *The State of Iowa*, 2 Iowa (Cole Ed.) 230, 278.

It is said that included in the decree of forfeiture is an island not "bonded" or used as a means of ingress or egress to, but entirely separate from, the distilling premises. Our attention, however, is called to nothing in the record which appears to verify these statements. No instructions to the jury were asked or given on the subject, nor was it considered by the court below or referred to in the application for certiorari. In these circumstances it is unreasonable to expect us to consider the question.

We have not overlooked other contentions made by petitioner, but, in so far as they are not met by what already has been said, we find it unnecessary to consider them for lack of substance.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.